NO. 88-634

SUPREME COURT, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

BONNIE KRUGMAN,

Petitioner,

vs.

PALMER COLLEGE OF CHIROPRACTIC,
WARREN RHODES, D.C., and
PATRICK T. KEEFE, D.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

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196 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the Supreme Court of Iowa erred in failing to apply the Due Process Clause of the Fourteenth Amendment when it invoked the use of sanctions in dismissing plaintiff's lawsuit rather than upholding plaintiff's right to a jury trial.

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PETITION FOR WRIT OF CERTIORARI

Bonnie Krugman hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of Iowa in this case.

OPINIONS BELOW

1. Bonnie Krugman v Palmer College of Chiropractic, Warren Rhodes, D.C., and Patrick Keefe, D.C., No. 86-896, slip op. (Court of Appeals of Iowa, November 30, 1987).

2. Bonnie Krugman v Palmer College of Chiropractic, Warren Rhodes, D.C., and Patrick Keefe, D.C., 422 N.W.2d 470 (Iowa, 1988).

JURISDICTION

This Petition for Writ of Certiorari seeks timely review of the Supreme Court of Iowa decision in Bonnie Krugman v Palmer College of Chiropractic, Warren Rhodes, D.C. and Patrick T. Keefe, D.C., No. 86-896, slip op. (Iowa, April 13, 1988) and the denial for rehearing by the Supreme Court of Iowa, en banc, on June 15, 1988, pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part:

Section 1. No State shall ... deprive any person of life, liberty, or property, without due process of law ...

STATUTE INVOLVED

Iowa Rule of Civil Procedure 134, in relevant part:

(b) Failure to comply with order.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under R.C.P. 174 "e" to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision "a" of this rule or R.C.P. 132, the court in which the action is pending may make such orders in regard to the failure as are just, and amoung others the following:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed or dismissing the action or proceeding or any part thereof, or rendering a judgment by default agaisnt the disobedeint party;

STATEMENT OF THE CASE

A. Course of proceedings: This case started out as a common law negligence action based on chiropractic malpractice, but has turned into a conflict between a litigant's right to trial under the Due Process Clause of the Fourteenth Amendment and the Court's adherence to its own procedural rules. It is a case of "exalting form over substance." (App.18). The gist of this appeal is the denial of Bonnie Krugman's right to a trial because her case was dismissed when her chosen counsel was unable to be present for her trial.

Plaintiff, Bonnie Krugman, filed her Petition based on chiropractic negligence against Palmer College and three other named chiropractors. Having experienced a series of recurrent headaches, Bonnie Krugman sought the care and treatment of a chiropractor, Warren Rhodes, who performed a chiropractic adjustment which included a

cervical spine manipulation. Soon thereafter, Ms. Krugman experienced an arterial venous malformation, or stroke, which necessitated brain surgery and left her permanently paralyzed on the left side of her body. Plaintiff commenced litigation on the general theory of negligent chiropractic care and treatment and, more specifically alleging that Dr. Rhodes failed to properly screen the plaintiff and rule her out as a potential stroke victim, failed to perform a spinal column stress analysis, failed to take a proper history and performed cervical manipulation that was contraindicated for the plaintiff's history and symptomatology.

The Palmer College of Chiropractic, Patrick T. Keefe, D.C., and Ron Ashe, D.C., were named defendants for failing to properly train a student-resident, Warren Rhodes, in screening and diagnostic testing for the appropriateness of cervical manipulation. Further allegations included the failure to institute a protocol to identify

potential stroke victims as a preliminary screening method and failure to supervise and instruct their student-residents. Dr. Ashe was granted summary judgment on April 14, 1986 and is not involved in this appeal.

The plaintiff, Bonnie Krugman, had retained the services of Attorney Paul R. O'Malley because of his expertise in handling cases of professional medical and chiropractic negligence. Mr. O'Malley filed the petition on September 1, 1982 and personally handled every facet of the litigation. The case of Krugman v Palmer College, et al. was set for trial for April 28, 1986. Concurrently running with the final trial preparations for the Krugman case was the matter of Van Hootegem v Stegmaier, M.D., pending in the Circuit Court of Rock Island County, Rock Island, Illinois. This case involved a drug reaction to a woman who became paralyzed and totally disabled. The plaintiff in the Van Hootegem case is brain damaged with 80% paralysis of her legs, 20%

paralysis of her arms, confined to a wheelchair and financially destitute.

On January 28, 1986, the trial court in the Krugman case, ordered the plaintiff list all expert witnesses she intends to call on or before February 28, 1986, ordered the defendants to list all expert witnesses they intend to call on or before March 14, 1986, ordered the closing of pleadings on March 31, 1986, ordered the completion of discovery on April 14, 1986, and ordered these dates to comprise the readiness schedule for the trial to be held on April 28, 1986. As a result of these orders, six experts not previously identified were disclosed three for plaintiff and three for the defense. Plaintiff complied with disclosure by naming her experts.

Concomitant with the final trial preparations in the Krugman case was the trial setting in the Van Hootegem case set during a pretrial on January 30, 1986 for April 14, 1986. Plaintiff's counsel has stated

on the record that he "believed at that time that I had scheduled this case (Krugman) and agreed to have this matter proceed in April that I had no conflict whatsoever in April." (App. 48) Plaintiff's counsel stated during the May 23, 1986 hearing to vacate the dismissal of Krugman and the barring of her experts that it was his belief that the Van Hootegem case would end prior to April 28.

At the January 30th pretrial in Van Hootegem, the trial court granted the use of another expert for the defense. In early April, 1986, the court in the Van Hootegem case expanded the issue in the lawsuit with regard to contributory negligence and causation. This opened up new avenues for additional experts and new issues for then existing experts to opine about. The final ten days prior to the initiation of the Van Hootegem trial involved a great deal of trial preparation. Two evidence depositions of physicians and experts were taken in early April. Because of this expansion of

the lawsuit and introduction of issues, the final trial preparation occupied all of plaintiff's counsel's time in April and the trial of Van Hootegem lasted for three weeks.

Plaintiff filed a motion for continuance on April 8th. Time was needed to take the depositions of the three experts disclosed by the defendants on March 15th; time was needed to take the depositions of plaintiff's experts disclosed on February 28th; and time was needed for the final pretrial submissions. The trial court denied this request for a continuance. Subsequent thereto plaintiff filed a Reconsideration of Application for Continuation of Trial Setting and for Extension of Time to Complete discovery. Attached to this motion is the affidavit of Dr. Neil Allen, one of plaintiff's experts, who stated that there was a causal relationship between the chiropractic cervical manipulation and the cerebrovascular accident or stroke. Plain-

tiff's counsel again recited the conflict between the Krugman trial setting and the Van Hootegem trial. Again it was disclosed to the court that six experts had been retained, three by the plaintiff on February 28th and three by the defendants on March 15th, and that five of these experts resided outside the jurisdiction. Also, the profound seriousness of Bonnie Krugman's injuries was pointed out to the court and that it would be manifestly prejudicial and unjust to the plaintiff to deny a request for additional time for the completion of discovery and an opportunity to fully prepare the matter for final pretrial settlement conference and trial setting. This motion was taken under consideration by the trial court and denied. In this order, the trial court noted that she had a conflict of interest and would not be the trial judge. Moreover, the trial court took notice of the insurance coverage situation of defendant Warren Rhodes and the Palmer

College of Chiropractic which became one of the bases for reversal by the Iowa Court of Appeals. (App. 15).

On April 28, 1986, the trial court used the ultimate sanction available to the court and dismissed plaintiff's case. Plaintiff had made it very clear up until this time of the various discovery problems in the case, that he would be on trial in another jurisdiction, and the need for more time to prepare the Krugman matter. All to no avail, the trial court adopted the defendants' position on their prejudice because of the plaintiff's failure to comply with orders. Finally, plaintiff filed a motion to vacate dismissal order and order of sanctions of April 28, 1986. In this motion, the following salient points were made: circumstances rendered it impossible for plaintiff's chosen attorney to be in attendance of the trial and prepare critical pretrial submissions; plaintiff has never made a previous request for a continuance;

plaintiff's request was for no more than six or seven weeks but that any date available to the defense counsel would have been acceptable to plaintiff; defendants only prejudice, if any, in the trial continuance is the continuance of pre-judgment interest which would ordinarily be stopped on a date certain upon proper motion filed by defendants; that the representations of the defense counsel that the Palmer College and Warren Rhodes were only covered by a policy of insurance of $100,000.00 should never be an issue or the basis of such severe sanctions as denial of a trial and right to chosen counsel to represent plaintiff at trial, and that plaintiff has a right to trial. This motion was denied and, hence, this appeal was taken.

B. Constitutional basis in a state proceeding: Twenty days prior to the April 28, 1986 trial date, plaintiff's counsel filed a motion to continue the final pre-trial setting, but this was denied. Counsel

filed a motion to reconsider which was denied. The opinion from the Court of Appeals of Iowa in this instant action delineates the chronology of events in both the Krugman case and the Van Hootegem matter and show how the competing trials conflicted with each other and caused plaintiff's counsel to be unavailable. (App. 6-9). On May 23, 1986 in plaintiff's motion to vacate dismissal order and order of sanctions, arguments were held before the trial court in which plaintiff's counsel argued the plaintiff's denial of a jury trial and how this entitlement was being unfairly taken away from her. (App. 62 - 63). These motions were denied and an appeal was taken in the Supreme Court of Iowa.

In Krugman's brief, she further argued her denial of due process and a right to trial. (App. 115).

Plaintiff further argued the basis for her constitutional right to due process and a jury trial in her reply brief (App. 144-145)

> In the case of R. E. Morris Investments, Inc., et al. v Lind, 304 N.W.2d 189 (Iowa 1981), the trial court struck the jury trial demand as a sanction for failure to comply with a discovery order. In discussing the abuse of discretion by the trial court, the Supreme Court stated that Rule 134 of the Iowa Rules of Civil Procedure is closely patterned after Federal Rule of Civil Procedure 37. Id. at 191. Further, in discussing the meaning of the ultimate use of sanctions, the court stated, 'it is clear that the use of sanctions pursuant to Rule 37 is limited by the due process clause of the Fifth Amendment.' Id. 'The right of jury by trial shall remain inviolate.' Id.

As can be seen from the decision of the Court of Appeals of Iowa, this court agreed with plaintiff's constitutional argument (App. 14 - 21)wherein it cited the significant language previously cited by the plaintiff in the case of Societe Internationale v Rogers, 357 U.S. 197, 209 (1958) as follows:

> [T]here are constitutional limitations upon the power of courts even in aid of their own valid processes, to dismiss an action with affording a party the opportunity for hearing on the merits of his cause.

The defendants then moved for the Supreme Court of Iowa to hear the matter. Again, plaintiff's raised the constitutional issue as follows:

> The plaintiff's right to a trial on the merits was the central theme of the plaintiff's two motions for continuance of the trial, plaintiff's motion to vacate the dismissal and sanctions as well as plaintiff's appeal. The fact that a right to a trial on the merits is founded in constitutional precepts is so fundamental as to not require extensive arguments and briefing on due process of law. (App. 145).

The Supreme Court of Iowa reversed the intermediate appellate court. The court in its opinion (App. 22-42). saw fit to ignore the constitutional issues raised by the plaintiff thus necessitating this Writ.

In Krugman's Petition for Rehearing to the Supreme Court of Iowa, the denial of due process was again raised and argued. (App. 161-165) . The Petition for Rehearing was summarily denied. (App. 167).

REASONS FOR ALLOWANCE OF THIS WRIT

This case presents important questions regarding the conflict between the Due Process clause of the Fourteenth Amendment of the U.S. Constitution and a State's need for procedural rules and sanctions limitations in civil litigation. The interface between state procedural rules which are necessary to control litigation and the constitutional right to due process touch, merge and clash in courtrooms everyday. In order to resolve this inherent conflict in our law, this Writ of Certiorari should be granted.

1. The Supreme Court of Iowa erroneously failed to affirm the Iowa Court of Appeals' decision to grant the plaintiff her right to trial.

The issue presented in this case is whether the ultimate sanction of case dismissal should have been imposed to the extent that this violated plaintiff's due process right to trial. Plaintiff filed a

tort action sounding in chiropractic mal-practice in the state district court of Iowa. The U.S. Supreme Court has held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. Mullane v Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), Logan v Zimmerman Brush Co., 455 U.S. 428 (1982). More pointedly, the U.S. Supreme Court has noted that "[a]rguably," a state tort claim is a "species of 'property' protected by the Due Process Clause." Martinez v California, 444 U.S. 277, 281-282 (1980). The plaintiff-petitioner has a property right protect by the Due Process Clause.

An analogous situation to the instant matter occurred to the constitutionally deprived party in Societe Internationale v Rogers, 357 U.S. 197 (1958). In that case the Due Process Clause of the Fifth Amendment was applied to a party whose due process right was violated when the United

States District Court dismissed the complaint with prejudice pursuant to the sanctions provision of Federal Rule of Civil Procedure 37 for the ostensible failure to comply with a pretrial production order. By this Writ, petitioner claims her due process rights were violated when a state trial court judge dismissed her petition at law for the ostensible failure to be available for trial when petitioner's counsel was on trial in another case. Societe Internationale v Rogers affirmed that:

> [T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. 357 U.S. at 208.

The clash between sanction rules (Fed.R.Civ.P. 37) and Fifth Amendment due process guarantees has imposed similar limitations in other jurisdictions. In Emerick v Fenick Industries, 539 F.2d 1379, 1381 (5th Cir. 1976), the court stated:

> The discretion of the district court to order sanctions under Rule 37(b)(2) is broad but not unlimited. The due process clause of the fifth amendment limits the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. Societe Internationale v Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). When the disobedient party is a plaintiff, dismissal with prejudice is a sanction of last resort, applicable with prejudice is a sanction of last resort, applicable only in extreme circumstances. Thomas v United States, Inc. v Time, Inc., 376 F.2d 118 (5th Cir. 1967). When the disobedient party shows that his recalcitrance was based on factors beyond his control or on the exercise of constitutional privilege, a reviewing court is justified in terming the dismissal an abuse of discretion. See Thomas v United States, supra; Dorsey v Academy Moving & Storage, 423 F.2d 858, 861 (5th Cir. 1970)." (538 F.2d 1381) (Emphasis added).

In Krugman v Palmer College, the trial court applied the sanctions provision of Iowa Rule of Civil Procedure 134 which is closely patterned after Federal Rule of Civil Procedure 37. Smiley v Twin City Beef Co., 236 N.W.2d 356, 359-360 (Iowa 1975).

In the instant action, plaintiff's case was dismissed when called by the court to start trial because plaintiff's counsel was unavailable due to another trial commitment. The need to be present at another trial was communicated to the Iowa trial court judge twenty days prior to the scheduled trial date. The findings in this record will demonstrate that plaintiff's counsel did everything possible to alert the trial court of this impossible tangle of trial commitments. Plaintiff's counsel's failure to comply with discovery orders in the final weeks prior to trial were not due to wilfulness, fault or bad faith. As with the sanctioned party in Societe Internationale v Rogers, plaintiff's counsel's failure to try Krugman v Palmer College was not due to his own conduct or by circumstances within his control. Counsel could not be at two trials at one time; a continuance was requested 20 days prior to trial; a continuance on discovery was requested when counsel

realized he could not complete deadlines. There were no other counsel of record available to try the case. As the Iowa Court of Appeals stated, "The severity of dismissal and the reasons for it need to be weighed against Krugman's right of due process of law. The attendant circumstances in this case weigh in favor of Krugman to proceed with her right to a trial on the merits of this case." (App. 10).

The Supreme Court of Iowa totally skirted this issue. The Supreme Court of Iowa erred when it failed to recognize Krugman's due process rights. The court elevated procedural controls over litigation to the extent it denied Krugman her day in court. Justice would better be served to allow Krugman to exercise her due process avenues rather than harshly slamming the doors on her because of a complicated litigation scenario that did not neatly conform to the trial court's interpretation of due process.

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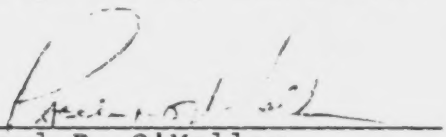
The practical effect of the Supreme Court of Iowa decision is to deny a complainant due process rights whenever counsel's trial commitments become entangled. Surely the needs of the litigant could better be met without unconstitutionally elevating a state's valid processes over due process protections.

CONCLUSION

For the aforementioned reasons, the Writ of Certiorari should be granted.

Respectively submitted,



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APPENDIX

APPENDIX 1

IN THE COURT OF APPEALS OF IOWA

NNIE KRUGMAN,

Plaintiff-Appellant,

LMER COLLEGE OF CHIROPRACTIC, RREN RHODES, D.C. and **TRICK T. KEEFE, D.C.** n Ashe, D.C.,

Defendants-Appellees.

F I L E D
NOV 30 1987
Clerk Supreme Court

7-201
86-896

Appeal from the Iowa District Court for Scott County (No. 66572), Margaret S. Briles and Edward B. deSilva, Judges.

Plaintiff appeals from the orders of two judges contending they abused their discretion in failing to continue the case, in applying sanctions, in dismissing her case, and in denying her motion to vacate these orders. **REVERSED AND REMANDED.**

Paul R. O'Malley of O'Malley & O'Malley, Chicago, Illinois and Alan Hartstock of Winstein, Kavensky, Wallace

& Doughty, Rock Island, Illinois for plaintiff-appellant.

Robert D. Lambert of Carlin, Hellstrom & Bittner, Davenport, for defendants-appellees Palmer College, Warren Rhodes, and Patrick T. Keefe.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

Plaintiff appeals from the orders of two judges, contending there was an abuse of discretion by the trial court in failing to continue the final pretrial, in failing to continue the trial, and in imposing sanctions by barring plaintiff's experts and dismissing plaintiff's petition, which was based on chiropractic negligence. We reverse and remand.

The plaintiff, Bonnie Krugman, sought chiropractic treatment from Warren Rhodes, a student resident. Krugman suffered a stroke soon afterwards. In 1982 she brought

a suit against Palmer College of Chiropractic, Rhodes, Patrick T. Keefe, and Ron Ashe. Ashe was granted summary judgment and is not involved with this appeal. Krugman retained the services of Attorney Paul R. O'Malley of Chicago, Illinois, for the suit because of his expertise in handling cases of chiropractic negligence.

This case was placed on the strike list under Iowa Rule of Civil Procedure 215.1, but Krugman filed a trial certificate stating the case would be ready for trial on January 10, 1986; the case was then removed from the strike list. On January 28, 1986, the parties were ordered to list their expert witnesses. Krugman and defendants identified six expert witnesses, three for Krugman and three for defendants. The trial was set for April 28, 1986. O'Malley had another case which was set for April 14, 1986, and was expected to last for two weeks and perhaps longer. On April 8, 1986,

Krugman asked for a continuance which was denied. Krugman asked the court to reconsider, which was also denied.

O'Malley's other trial took three weeks. On April 28, 1986, the date set for this trial, neither he nor Krugman was present. Local counsel was present but unprepared to try the case. The trial court ruled that Krugman's expert witnesses were precluded from offering expert opinion testimony because the experts were not made available to defendants prior to trial for depositions. The court also ruled that Krugman's petition be dismissed. Krugman filed a motion to vacate the dismissal order and sanctions order, stating that circumstances had made it impossible for her chosen attorney to be in attendance at the trial. This motion was denied.

On appeal, Krugman contends that the trial court abused its discretion in failing to continue the final pretrial and the

trial, and in imposing sanctions by barring her experts and dismissing the case. Krugman states that any discovery noncompliance was not due to willfulness, fault, or bad faith: Krugman's attorney could not be in two courtrooms at one time. Krugman argues that the sanction of dismissal should not be imposed when there is inability to comply with a court's order.

The defendants moved to dismiss Krugman's appeal for lack of jurisdiction on the ground that Krugman's notice of appeal was untimely. The supreme court found that Krugman's motion to vacate dismissal/sanctions order was in essence a motion pursuant to Iowa Rule of Civil Procedure 179(b), thus extending the time for filing notice of appeal. The defendants' motion to dismiss was denied. We thus retain jurisdiction of the matter.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

A scenario of the relevant events in the two conflicting cases may be summarized as follows:

Krugman	Van Hootegem	Occurrence
	(conflicting Illinois trial)	
9/1/82		Petition filed
9/16/85		Plaintiff's certificate of readiness for trial on 1/10/86
10/22/85		Order removing case from strike list and order setting trial for 4/28/86
1/28/86		Order setting dates for closing of pleadings, completion of discovery, and listing of experts (a) Plaintiff's experts listed by 2/28/86, (b) Defendants' experts listed by 3/15/86, (c) Pleadings closed by 3/31/86, (d) Discovery completed by 4/14/86
	1/30/86	Pretrial conference
	2/86	Plaintiff disclosed 12 experts
	2/10/86	Original trial date

2/28/86		Plaintiff identified 3 experts
3/14/86		Defendant identified 3 experts
3/21/86		Defendants' motion to compel supplemental answers to interrogatories (as to subject matter of plaintiff's 3 experts' testimony)
4/1/86		Order for Plaintiff to supplement interrogatories and make plaintiff's experts available for depositions
	4/3/86	Motions heard
4/7/86		Plaintiff supplemented interrogatories
	4/7/86	Deposition in Madison, Wisconsin
4/8/86		Plaintiff's application to continue final pretrial conference and trial
	4/9/86	Pretrial conference
4/9/86		Order denying continuance, cancelling settlement conference, and

		ordering settlement conference documents (exhibits list) by 4/21/86
4/10/86		Plaintiff's motion for reconsideration for continuance of trial and extension to complete discovery
	4/11/86	Deposition in Chicago, Illinois
4/11 & 4/16/86		Defendants' motion for sanctions for plaintiff's failure to timely supplement interrogatories and make available 3 experts for depositions; and supplement thereto
	4/14/86	Trial commenced
4/21/86		Order denying plaintiff's continuance and extension of discovery and continuing defendants motion for sanctions until after depositions taken (at time of trial)
4/22, 4/25 & 4/28/86		Defendants' motions for sanctions for plaintiff's failure to file settlement conference docu-

		ments and plaintiff's failure to make experts available for depositions
4/28/86		Plaintiff's interlocutory appeal filed
4/28/86		Trial date; order precluding plaintiff's 3 experts from testifying and dismissing plaintiff's claim
	5/1/86	Trial concluded
	5/5/86	Mistrial declared
5/8/86		Plaintiff's motion to vacate dismissal and order of sanctions
5/27/86		Order denying motion to vacate
6/19/86		Notice of appeal

I. **Motion to Continue.** Krugman's first argument on appeal is that there was an abuse of discretion on the part of the trial court in failing to continue the final pretrial and trial. Trial courts have broad discretion in deciding whether to grant motions for continuance; absent a clear

abuse of discretion we will not interfere. Department of General Services v. R. M. Boggs Co., Inc., 336 N.W.2d 408, 410 (Iowa 1983). An abuse of discretion refers to "an erroneous conclusion and judgment, one clearly against logic and effect of facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982). The fact that an attorney has a conflicting trial schedule does not give him an automatic right to a continuance. Dept. of General Services, 336 N.W.2d at 410. The trial court's action in denying a motion to continue must be unreasonable under the attendant circumstances in order to find an abuse of discretion. See State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979).

In this case we conclude the trial court abused its discretion in denying Krugman's application to continue the pre-

trial conference and trial and in denying Krugman's application to reconsider continuance of the trial and extend the time to complete discovery.

We look to the case of Dept. of General Services, 336 N.W.2d at 408, for our guidance. That case is factually similar to the case at bar. In Dept. of General Services, the trial attorney was scheduled for two overlapping trials in the same courthouse. Trial counsel had no one else, other than an inexperienced young associate, to try the case. Counsel had previously consented to the trial date, believing the trial in conflict would be settled or completed the prior week. Ten days before trial, counsel realized the conflicting case would not be settled and, in addition, would take three weeks rather than the estimated one week. Trial court denied the motion for continuance. Interlocutory appeal was taken, proceedings were stayed, and the case

settled. However, the supreme court considered the appeal as not being moot in order to provide authoritative adjudication for future guidance in cases involving similar issues. The court held that the trial court abused its discretion in denying the continuance and cited with approval Coburn v. Domanosky, 257 Pa. Super. 474, 480, 390 A.2d 1335, 1338 (1978), which stated:

> [T]he most important factor [for granting the continuance is that] counsel did offer a reasonable explanation for his scheduling conflict, specifically, that he thought that he could handle both the civil and criminal cases because the criminal case looked to be a short one, and because the civil case was far down on the list [of civil cases for that week].

In the present case (1) Attorney O'Malley indicated 20 days before trial that he desired a continuance due to the fact the conflicting case he was to try in another state would take three weeks, rather than his estimated two weeks, which would

cause overlapping of the two cases; (2) Attorney O'Malley was the sole litigator in this matter, although local counsel was of record, and was hired by Krugman because of his professional malpractice expertise; (3) Attorney O'Malley was committed to the court in the conflicting case (a medical malpractice drug reaction trial), which was of just as significant a posture as the Krugman case wherein O'Malley's expertise was required; and (4) due to six new experts being identified by both Krugman and defendants on February 28 and March 15, 1986, respectively, it would be next to impossible to schedule all their depositions by the trial date of April 28, 1986, due to scheduling conflicts and the fact the experts were located across the country.

Trial court, Judge Briles, in her ruling denying Krugman's motion to continue stated that no good cause was shown for a continuance; that all fault and neglect in

this case had been by the plaintiff; and that Attorney O'Malley's failure to supplement interrogatories was a "deliberate ploy to avoid the trial date." In Judge Briles' order on Krugman's motion to reconsider continuance of trial date, she noted that dates as outlined in the pretrial conference could be extended upon a showing of good cause; referred to the fact that defendants were of limited insurance coverage; that no excuse was shown why Krugman had not made her experts available for depositions; and that other attorneys were available for Krugman. She also continued defendants' motion for sanctions until all the depositions were taken when the experts arrived as Scott County for the trial, at which time the court would then determine if defendants were prejudiced.

We are in disagreement with Judge Briles' ruling that "good cause" was not demonstrated to continue the case. This

was Krugman's first and only request for a continuance; there is no doubt Attorney O'Malley's presence was imperatively required in two places at one time; that he advised the court at his earliest knowledge, 20 days before trial, of the need for a continuance; that Attorney O'Malley was chosen in each of the two conflicting trials, it was not possible for him to meet the discovery request; and that Judge Briles' knowledge of defendants' limited insurance coverage was of no consequence to the merits of ruling on the motion for continuance. We reverse for abuse of discretion of the trial court's clearly untenable and unreasonable reasons for denying plaintiff's motion to continue. See Hubby v. State, 331 N.W.2d 690, 697 (Iowa 1983).

II. **Sanctions.** Krugman also argues there was an abuse of discretion on the part of the trial court, Judge deSilva, in imposing sanctions by precluding her experts from

testifying at trial and dismissing her petition on April 28, 1986, the date set for trial. She also alleges the court abused its discretion in denying her motion to vacate the dismissal order and order of sanctions.

The basic rule of sanctions is that the imposition of sanctions by the trial court is discretionary and will not be reversed unless there has been an abuse of discretion. Sullivan v. Chicago and Northwestern Trans., 326 N.W.2d 320, 324 (Iowa 1982). However, where the sanction selected by the trial court is dismissal of the action, the range of discretion is narrowed. Suckow v. Boone State Bank and Trust Co., 314 N.W.2d 421, 425 (Iowa 1982); Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). In order to justify dismissal of the action, a party's non-compliance must be due to willfulness, fault, or bad faith. Fox v. Studebaker-

Worthington, Inc., 516 F.2d 989, 993 (8th Cir. 1975); McQuillen v. City of Sioux City, 306 N.W.2d 789, 791 (Iowa 1981); Smiley, 236 N.W.2d at 360; Sukow, 314 N.W.2d at 425. Krugman contends that the basic error of the trial court, both Judge Briles and Judge deSilva, was that whatever non-compliance occurred in getting the discovery done and making preparations for trial, none was due to willfulness, fault, or bad faith.

Iowa Rule of Civil Procedure 134 dealing with sanctions is substantially the same as Federal Rule of Civil Procedure 37; it is clear that the use of sanctions pursuant to Rule 37 is limited by the due process clause of the fifth amendment. R. E. Morris Investments, Inc., et al. v. Lind, 304 N.W.2d 189, 191 (Iowa 1981 (trial court's striking jury trial demand as a sanction for failure to comply with a discovery order was an abuse of discretion). In addition, the United States Supreme Court has stated:

> [T]here are constitutional limitations upon the power of courts, even in aid of their own valid process, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S. Ct. 1087, 1094, 2 L.Ed. 2d 1255, 1265 (1958).

The issue we are presented with in the present case involves exalting form over substance. Krugman's rights are damaged by dismissal of her case and denial of expert testimony. The harsh sanctions of dismissal we find to be disproportionate to Attorney O'Malley's failure to comply with the discovery orders. Less drastic alternatives were available. Krugman should not be punished when her counsel could not be at two trials at one time and asked for his first continuance of the case 20 days before trial was to commence and also moved for a continuance on discovery when he realized he could not complete the deadlines.

Local counsel did not have the expertise to try the case. The chart set out earlier in this opinion demonstrates the intertwining events of Attorney O'Malley's commitments to both trials. The severity of dismissal and the reasons for it need to be weighed against Krugman's right of due process of law. The attendant circumstances in this case weigh in favor of Krugman to proceed with her right to a trial on the merits of this case. We find Attorney O'Malley has not been willful, at fault, or acted in bad faith in his conduct with regard to discovery orders and procedural matters. We find he listed his experts on February 28, 1986, in compliance with the January 28, 1986, court order. Krugman was ordered to supplement interrogatories by April 4, 1986; the supplement was mailed on April 4, 1986 and on file April 7, 1986. he altered the court at his earliest opportunity to the extenuating circumstances of the situation he was in.

With regard to the sanction of Judge deSilva excluding Krugman's three experts from testifying due to their unavailability for depositions by defendants, we note that Judge Briles in an earlier ruling allowed defendants to take the three depositions when the experts arrived for trial at Scott County, at which time the court would then decide if defendants had been prejudiced by being precluded from their testimony at an earlier date. Because of Judge Briles' previous ruling in this regard and because of our decision that this case is reinstated, we reverse the trial court's decision and permit the testimony of Krugman's three experts who were named on February 28, 1986.

We additionally hold that this opinion is to be construed in light of the particular circumstances of this case. Because of our ruling, we do not address Krugman's motion to vacate dismissal. We therefore

reverse the trial court in accord with the foregoing decision and remand this case to be set for trial.

REVERSED AND REMANDED.

APPENDIX 2

IN THE SUPREME COURT OF IOWA

BONNIE KRUGMAN, Appellant,	)	**F I L E D** APR 13 198 Clerk Supreme
vs.	)	
PALMER COLLEGE OF CHIROPRACTIC, WARREN RHODES, D.C. and PATRICK T. KEEFE, D.C. Appellees.	)	82 86-896

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Scott County, Margaret S. Briles and Edward B. deSilva, Judges.

Plaintiff appeals district court order dismissing her action due to failure to comply with prior court orders compelling discovery. DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

Paul R. O'Malley of O'Malley and O'Malley, Ltd., Chicago, Illinois, and

Winstein Kavensky, Wallace & Doughty, Rock Island, Illinois for appellant.

John J. Carlin and Robert D. Lambert of Carlin, Hellstrom & Bittner, Davenport, for appellees.

Considered by McGiverin, C.J., and Harris, Carter, Lavorato and Andreasen, JJ.

McGIVERIN, C.J.

Plaintiff Bonnie Krugman appeals the trial court's order precluding her form using three of her medical experts at trial and dismissing her petition as a sanction for failing to meet court-ordered discovery deadlines. Additionally, plaintiff asserts error in earlier orders denying her motions for a trial continuance. We believe one issue is determinative of this appeal: whether the trial court abused its discretion by imposing the harsh sanction of dismissing the plaintiff's petition. The court of appeals held that there was an abuse of discretion, reversed the trial court, and

remanded for a trial. Finding no abuse of discretion in the trial court's dismissal riling, we vacate the court of appeals decision and affirm the trial court. thus, we do not reach the question of plaintiff's use of experts or her motions for continuance.

I. Background facts and proceedings. This case stems from plaintiff's allegation that negligent care she received at the Palmer College of Chiropractic from defendants Warren Rhodes and Patrick T. Keefe on September 3, 198, directly caused a stroke she suffered the following day. The stroke necessitated major neurosurgery and left her partially paralyzed. Deciding to bring suit, she sought the counsel of Paul R. O'Malley, a Chicago attorney well versed in medical and chiropractic malpractice litigation. O'Malley obtained the services of Winstein, Kavensky, Wallace and Doughty of Rock Island, Illinois as local counsel

for an action in the Iowa district court.

Plaintiff filed her petition in this case on September 1, 1982, only three days before the statute of limitations on her cause of action would have run. See Iowa Code §614.1(9) (1979). This late filing set the tone for attorney O'Malley's subsequent actions on Krugman's behalf.

After filing their answers, defendants, Palmer College of Chiropractic, Rhodes and Keefe, served plaintiff with a set of interrogatories which included request for the names of the plaintiff's expert witnesses, the general substance of their opinion, and the facts upon which those opinions were based. See Iowa R. Civ. P. 125(a). Plaintiff responded that those interrogatories could not be answered because no expert had yet been retained.

Over the next six months, defendants made repeated attempts, pursuant to Iowa Rule of Civil Procedure 125(c), to get the

plaintiff to supplement her answer to interrogatory number seven concerning plaintiff's medical experts. The court, at defendants'' request, entered an order dated May 9, 1983, requiring plaintiff to file a list of experts and answer defendants' interrogatories before filing a certificate of readiness for trial.

On February 1, 1984, seventeen months after the case was first filed, defendants filed a motion for summary judgment. See Iowa R. Civ. P. 237. Their motion supported by the opinions of two treating neurosurgeons and a chiropractor, argued that there was no causal connection between the chiropractic care plaintiff received and her subsequent stroke and noted that the plaintiff had yet to secure an expert medical witness. In response to defendants' summary judgment motion, plaintiff's attorney obtained a sixty day extension of time to depose four of defendants' medical

experts, on May 23, 1984, he filed the affidavit of a Chicago physician, Dr. Neil Allen, stating that Dr. Allen believed there was a causal connection between plaintiff's chiropractic care and her stroke.

No further action occurred in the case until 1985. Then pursuant to Iowa Rule of Civil Procedure 215.1, the case was scheduled to be dismissed for want of prosecution and notice was sent to all parties. On September 16, 1985, in response to the rule 215.1 strike notice, plaintiff filed a trial certificate of readiness, see Iowa Rule of Civil Procedure 181, stating that the case would be ready for trial on January 10, 1986. A trial setting conference was held the next month on October 22, 1985, at which time all counsel agreed to a trial date of April 28, 1986, and the case was removed from the rule 215.1 strike list.

Defense counsel, after repeated attempts to depose Dr. Allen, then filed

a motion to compel his production for a deposition. A deposition was finally obtained in late December 1985, over eighteen months after Dr. Allen's affidavit was filed.

The following month, the defendants also filed a motion for scheduling order with the court noting that the previous order of May 9, 1983, which required plaintiff to list her expert witnesses and supplement her interrogatory answers before filing a certificate of readiness, had not been honored. See Iowa R. Civ. P. 125(c) and 136(b). A scheduling order was entered on January 28, 1986.[1] In that order, plaintiff was required to list her expert witnesses by February 28 and defendants were required to list their experts by March 14. Discovery was to be concluded by both sides on April 14.

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[1]All dates in the reminder of this opinion occurred in 1986 unless stated otherwise.

Two days later, on January 30, attorney O'Malley participated in a pretrial conference in an Illinois action. O'Malley expected that case to last only two weeks, allowing him to be free for the Krugman trial date of April 28. Opposing counsel in the Illinois case, however, expected the case to take a minimum of three weeks.

By agreement of the parties on February 19, Dr. Kassell, one of the neurosurgeons who treated Krugman, was to be deposed in St. Louis, Missouri, on March 14. Dr. Kassell was deposed on that date by defendants' attorneys, but O'Malley failed to appear to cross-examine or to take a separate discovery deposition he had scheduled with Dr. Kassell.

Plaintiff submitted a letter to defense counsel on February 28 listing three new experts, but the letter did not divulge the opinions they might offer at trial or the facts upon which their opinions would be

based. The letter added that "other [unnamed] treating physicians disclosed through discovery: might be called to offer expert testimony at trial. Defendants then filed their list of experts which included the names of two new experts not previously listed along with eleven other experts of whom plaintiff was previously made aware.

April saw a flurry of motions, hearings and rulings in this case. Defendants sought court ordered supplementation of their original interrogatories, particularly interrogatory number seven relating to plaintiff's experts and their opinions and exclusion of any expert witness not properly identified. See Iowa R. Civ.. P. 125(c) and 234(a). That order was granted on April 1. In addition to compelling plaintiff to supplement her answers by April 4, the order required that plaintiff make her experts available for deposition prior to trial or risk Iowa Rule of Civil Procedure 134(b)

sanctions. Plaintiff mailed a supplemental answer to interrogatory seven on April 4. It arrived and was filed April 7, one working day late.

The following day, at a motion for summary judgment hearing, attorney O'Malley filed a motion for continuance. He stated to the court for the first time that he was involved in a complex medical malpractice trial in Illinois that would interfere with his ability to properly prepare for Krugman's trial and would overlap the trial dates then slated for Krugman's trail. O'Malley also sought continuation of the final pretrial conference date in the Krugman case because he had scheduled an important deposition in his Illinois action on the same date.

On April 9, Judge Briles overruled the motion for continuance; and, because another date could not be agreed upon which would not conflict with O'Malley's Illinois com-

mitments, the final pretrial conference was canceled. Additionally, the court ordered plaintiff to file the documents required by court rule 7.1B of Iowa's seventh judicial district on or before April 21 (those documents were the exhibit list, pretrial brief, proposed jury instructions, and negligence action checklist including a detailed itemization of damages). We quote relevant sections of the court's ruling which explain its decision:

> No good cause is shown for a continuance. All fault and neglect in this case has been by the plaintiff to file a supplemental answer to Interrogatory No. 7 of the Palmer College interrogatories, the plaintiff never intended to be ready for trial on the 28th of April, 1986. The plaintiff has taken no move to take evidentiary depositions of her own experts, although her attorney advises that he does plan to present the testimony of some, if not all of them by evidentiary deposition. It is clear that the attorney for the plaintiff has known since February that he was planning to use these doctors. The failure to file the answers to the interrogatories designating these persons as experts and supplying the other information required appears to have been a deliberate ploy to avoid the trial date

which had been set October 22, 1985.

> Counsel complains that he has to try a three-week complex medical malpractice case in Rock Island, Illinois, beginning on April 14, 1986. This [the Illinois] case, however, was set only three months ago, and counsel does not pretend that he ever told the Illinois judge that he had this conflict and that if that case could not be tried in two weeks he would not be able to try it.
>
> The Court notes that competent trial counsel from Rock Island, Illinois, members of whom are qualified to practice law in the State of Iowa, have appeared in this case since its inception. Plaintiff's counsel has not advised the Court that there are not other persons in his law firm who could try one or the other of these two cases, and the Court finds no reason to relieve plaintiff's attorney or the plaintiff from the situation in which they have placed themselves. this case has been on file for three and one-half years, and that is long enough. If the case were not tried April 28th, it would be a substantial period of time before another trial setting would be available.

Subsequently, the defendants filed a motion for sanctions asking that the the three experts identified by plaintiff in February be barred from testifying because plaintiff had not met the April 4 supple-

mentation deadline. Also, Plaintiff filed a motion to reconsider her application for a continuance. In answer to Judge Briles' earlier ruling, attorney O'Malley added in that motion that he was the only attorney sufficiently knowledgeable to try either the Illinois case of the Krugman case, that he had too little time to depose the five newly listed experts before trial, and that the Illinois judge had refused to continue that case.

A hearing was held on both motions on April 16. O'Malley managed to attend despite the fact that his Illinois trial had already begun. In an order filed April 21, Judge Briles refused to continue the trial and ruled that plaintiff's experts should be deposed on the date of trial. The court added that plaintiff's experts could be barred from testifying in the trial if the lateness of deposition testimony taken on the trial date showed prejudice to defendants' case.

On April 28, neither the plaintiff, her experts nor attorney O'Malley appeared for trial or depositions. Alan Hartsock of the firm that was co-counsel with O'Malley appeared, but Hartsock was not prepared to try the case. Defendants and their counsel and a jury panel were present for trial. Judge deSilva, sitting as the trial court, imposed sanctions on plaintiff under Iowa Rule of Civil Procedure 134(b). The court ruled that plaintiff's experts were barred from testifying. It also dismissed plaintiff's petition. After unsuccessfully moving to vacate that ruling, plaintiff appealed.

II. Dismissal as a sanction. Initially, we must determine whether dismissal was a proper sanction in this case. If it was all of the other issues raised on this appeal are moot.

The legal standards by which we judge a court's exercise of discretion in imposing

sanctions are well established. Our decision in Postma v Sioux Center News, 393 N.W.2d 314 (Iowa 1986), condensed the following statement of the law from our prior opinions for the guidance of the bench and bar:

> Iowa rule of civil procedure 134(b)(2)(C) expressly authorizes a court to dismiss an action as a sanction for failing to comply with the discovery order. See Annot., 32 A.L.R.4th 212 (1984).
>
> We have long recognized the "[i]mposition of discovery sanctions by a trial court is discretionary and will not be reversed unless there has been an abuse of discretion." Sukow v. Boone State Bank & Trust Co., 314 N.W.2d 421, 425 (Iowa 1982); State ex rel. Parcel v St. John, 308 N.W.2d 8, 10 (Iowa 1981); Eickelberg v Deere & Ford Motor Co., 257 N.W.2d 7, 14 (Iowa 1977). Where, however, the trial court selects dismissal of the actions as the appropriate discovery sanction, the range of discretion is narrowed. (Iowa 1975). We have held that "[i]n order to justify dismissal of the action, a party's noncompliance must be due to willfulness, fault or bad faith." Suckow, 314 N.W.2d at 425, citing McQuillen v City of Sioux City, 306 N.W.2d 789, 791 (Iowa 1981) (plaintiff's willful noncompliance with court order to submit to a medical examination justified sanction of dismissal).

> We have divided our decisions involving discovery sanctions into two categories: (1) violation of a trial court discovery order, and (2) violation solely of a rule of civil procedure relating to discovery. see Suckow, 314 N.W.2d at 425-26. A comparison of the tow classes of cases "makes it clear that dismissal is a discovery sanction generally used when a party has violated a trial court's order." Id. at 426, citing Zimmerman v Purex Corp., 256 Iowa 190, 194-95, 125 N.W.2d 822, 825 (1964) (sanction was improper in the absence of a court order setting a specific time limit to answer interrogatories).

Id. at 318.

These principles guide our analysis of Krugman's appeal.

Given the foregoing authorities, it was within the trial court's discretion to order dismissals. Plaintiff violated (1) the January 28 order by failing to complete discovery; (2) the April 1 order by filing her supplementation to defendants' interrogatory number seven late, and by failing to make her experts available for discovery as ordered; and (3) the April 9 order by failing to file the settlement conference

documents required under district court rule 7.1B. Attorney O'Malley was aware of these orders and willfully did not comply with them in the hope, it appears, that a motion for continuance would solve his difficulties.

When the trial court dismissed plaintiff's petition in April 1986, it was under a duty to consider our case processing time standards in its deliberations. See Iowa Court Rules, Time Standards for Case Processing [supreme court order August 22, 1985; effective October 1, 1985]. The suggested time standard for civil jury cases from filing to disposition is eighteen months. On the date of trial, this action was over three and one-half years old, and the trial court was faced with the choice of either continuing or dismissing the case. Understandably, the trial court focused upon attorney O'Malley's conduct in failing to adequately prepare the case for trial to facilitate its disposition.

We agree with the trial court that the fault here lies with attorney O'Malley. He agreed to several dates that he later failed to meet, and he agreed to them knowing the potential for conflict. Most of his trial preparation was done in response to various motions by opposing counsel. Despite O'Malley's considerable efforts in the last twenty days before trial to explain and justify his predicament to the trial court, we conclude it was not an abuse of discretion in this case to find that O'Malley's efforts came too late to extract him from a predicament of his own making. See generally Suckow v Boone State Bank & Trust Co., 314 N.W.2d 421, 425-26 (Iowa 1982) digesting various cases where sanctions have been enforced).

We also find it relevant that there is a long record of procrastination and inattentiveness on O'Malley's part in this case. A party responding to an interroga-

tory has a continuing duty to supplement a response concerning the identity, subject matter and substance of testimony of an expert witness. Hubby v State, 331 N.W.2d 690, 697 (Iowa 1983); Iowa R. Civ. P. 125(a)(2). O'Malley has neglected to follow this rule, even at court order. Judge deSilva found that "The totality of the record establishes willfulness, bad faith, fault and gross neglect, all to the prejudice of [defendants]." We cannot say in light of attorney O'Malley's overall conduct that the court abused its discretion in dismissing plaintiff's petition.

As attorney O'Malley urges, there are similarities between this case and Department of General Services v R.M. Boggs Co., Inc., 336 N.W.2d 408, 411 (Iowa 1983), which held that an attorney scheduled for simultaneous trials should have been granted a continuance. There are also important differences. The conflict in Boggs involved

two overlapping trials in the same courthouse, facilitating resolution within our unified court system. More importantly, the attorney in Boggs alerted the court to the conflict and agreed to the trial date in question with the caveat that a conflict might later arise. Had O'Malley done the same thing, even though his conflicting trials were in different jurisdictions, he would have reduced confusion, expense and frustration for all parties involved.

As we have cautioned before, continuances are to be discouraged, and attorneys should not take responsibility for more litigation and legal work than they can reasonably handle. Boggs, 336 N.W.2d at 411. Where possible, more than one attorney should be versed in pending litigation. While the other attorneys of record in this case may not have been experts in chiropractic malpractice claims, their help might at least have been used in depositions if not at trial.

We regret that the sanction in this case visits the sins of counsel on his client. But "[a] litigant chooses counsel at his peril, and her, as in countless other contexts, counsel's disregard of his professional responsibilities can lead to extinction of his client's claim." Cine Forty-Second St. Theatre v Allied Artists, 602 F.2d 1062, 1068 (2nd Cir. 1979) (citing Link v Wabash R. Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1390, 8 L. Ed. 2d 734, 740 (1962)).

III. Disposition. Finding no abuse of discretion, we affirm the trial court's ruling and judgment dismissing plaintiff's cause of action. The other issues raised in this appeal are thus made moot, and we do not address them. The decision of the court of appeals reversing the trial court is vacated.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED.

APPENDIX 3

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

BONNIE KRUGMAN,	)	
	)	
Plaintiff,	)	LAW No. 66572
	)	
v.	)	
	)	
PALMER COLLEGE OF CHIROPRACTIC, WARREN RHODES and PATRICK T. KEEFE,	)	TRANSCRIPT OF HEARING
	)	
Defendants.	)	

The above-entitled matter came on for hearing before the Honorable Edward B. deSilva, Jr., on the 23rd day of May, 1986 at the Scott County Courthouse in the City of Davenport, Iowa.

A P P E A R A N C E S

ATTORNEY PAUL R. O'MALLEY, 33 North Dearborn, Chicago, Illinois appearing on behalf of the Plaintiff.

ATTORNEY JOHN J. CARLIN, 1002 Kahl Building, Davenport, Iowa appearing on behalf of Palmer College.

ATTORNEY ROBERT D. LAMBERT, 811 Kahl Building, Davenport, Iowa appearing on behalf of Palmer College.

ATTORNEY MICHAEL W. LIEBBE, 116 East Sixth Street, Davenport, Iowa appearing on behalf of Warren Rhodes.

ATTORNEY GREG A. EGBERS, 600 Union Arcade Building, Davenport, Iowa appearing on behalf of Patrick T. Keefe.

Sandra Tripp
Official Shorthand Reporter
Scott County Courthouse
Davenport, Iowa

Transcript ordered: June 25, 1986
Transcript delivered: July 25, 1986

(WHEREUPON, the following proceedings were had in open court.)

THE COURT: This is Bonnie Krugman, Plaintiff, versus Palmer College of Chiropractic, Warren Rhodes and Patrick Keefe, Defendants; Cause No. 66572. This matter is coming on for hearing this morning on Motion to Vacate Dismissal Order and Order of Sanctions. This motion was filed on

May 8, 1986 by a Paul R. O'Malley, who is the attorney for Bonnie Krugman, Plaintiff, and by Allan Hartsock, appearing as co-counsel with Mr. O'Malley. Present in the court this morning are attorneys for all parties.

Mr. O'Malley, this is your motion. Do you wish to speak to it at this time, sir?

MR. O'MALLEY: Yes, your Honor. First of all, Your Honor, I'd like to apologize to everybody here for my delay at O'Hare, which is apparently not terribly unusual, but unpredictable under the circumstance. I was forced to sit on the ground in a position where I couldn't make a phone call or couldn't do anything for fifty minutes from the time I entered the plane until the time of takeoff at O'Hare.

It was basically an incarceration in my judgment, but in any event I did call the Court as soon as I did land, and I apo-

logize to everyone here for the delay of having to wait for me.

THE COURT: Mr. O'Malley, your apology is accepted by the Court. And I had a daughter come in on Air Wisconsin this week, and we waited for about an hour and twenty minutes for her to get off. So I understand and you may proceed.

MR. O'MALLEY: Thank you. This is a Motion to Vacate the Dismissal Order and Order of Sanctions on April 28, 1986. And in my submission and filing I attempted to, as best I could, set forth in detail the events which led up to this dismissal order from the Plaintiff's perspective, which I don't feel was adequately represented in previous orders or previous documents to the extent that it is stated herein. And it's not my attempt to go over everything here in this particular order, but I will address anything that the Court chooses me to address specifically with

respect to the relief that I'm requesting.

But in essence, the Court, I'm sure, has had an opportunity to review this and review the other orders that have been entered. And in summary, I'd like to state this, that -- that some time ago last fall an order was entered with respect to disclosure of certain experts and the dates given for the Plaintiff's disclosure was February 28th of 1986 and to be followed by disclosure of experts by Defendants on March 15, 1986. And as a result of those orders and disclosures six experts -- six people who had not been previously identified, three Plaintiff's experts and three Defense experts, were brought to light during those disclosures, and that in anticipation of a trial date that was set on April 28, 1986.

What complicated the completion and my inability to be a part of and to participate in the balance of discovery, and

in my inability to participate in preparation -- the essential preparation of this trial in terms of all final pretrial orders and final pretrial conference, submission of instructions, of objections, motions in limine and other matters to be brought before the Court, was occasioned by the following circumstances.

That I had another case of very significant posture in Rock Island County, Illinois that is in fact, older than this case, but was originally set for trial in January of this year. And I believed at the time that I had scheduled this case and agreed to have this matter proceed in April that I had no conflict whatsoever in April. In January of this year, not upon my urging, but upon the urging of my opponent in another case in Rock Island County, which I have identified in this case as Jan VanOteghen, a motion was granted continuing my January case to April. In

fact, it was continued to April 14, 1986.

It was my belief at that time that that case would end at that point, not conflict with my ability to be prepared to try the Krugman matter on April 28, 1986, because I believed that that case would take less than two weeks. As a result of an additional order granting another expert to my opponent in this case, and then subsequently in early April upon a pretrial hearing, the Court in the VanOteghen case drastically expanded the issues of that lawsuit particularly with regard to contributory negligence and with regard to causation, opened up new avenues for additional experts. And the upshot of it was that a less-than-two-week case is going to end up being a three-week case, and that there was going to have to be a flurry of activity with regard to final experts' depositions, evidence depositions and discovery depositions during the ten days leading up to that trial.

And it was on April 3rd that I finally realized that it was going to be an impossible situation for me to effectively be a part of both this case before this Court and the VanOteghen case. I, in fact, addressed the Trial Court and advised the Court that I had a conflict and that I couldn't possibly be available to both cases. And Judge Edward Keefe in Rock Island County advised me that as far as he was concerned I was committed to his courtroom and that I should be prepared to proceed. On that basis I then proceeded to file a Motion to Continue the Krugman case from its present pretrial posture and to allow me additional time to not only complete the balance of discovery that was necessary in the Krugman case, specifically the three experts' depositions that were disclosed on March 15th for the first time to me by my opponents, and for also additional time for my opponents to take deposi-

tions of my three experts that were disclosed on February 28th, and for additional time to complete the necessary preparation for final pretrial conference, pretrial motions, pretrial submissions. That order on the hearing was held on April 8th and denied at that time.

Subsequent thereto I was advised that I should attempt again to seek a continuance of my Rock Island County conflict case, because at that point I apprised the Court that it was very likely that it was going to be a three-week trial and the likelihood of it being settled was very remote. Later on as the date approached April 14th and prior to there -- the ten days prior thereto, I attended four evidence depositions outside of -- in various jurisdictions. One of them was in Wisconsin; one was in Springfield; one of them was in Chicago, and one of them was in Rock Island County. And during that time I was totally

engaged and unable to participate in any discovery activities in this case.

After the case was sent up to trial and it was clear that the matter would not be settled -- in fact, I should apprise the Court there was never an offer in that lawsuit -- and it involved a very serious substantial injury involving a drug reaction to an Illinois resident who became paralyzed and was totally disabled, and it was a medical case that I had been engaged because of my experience and my knowledge and my training with respect to managing such matters. That after that case was sent to trial, I then refiled another application before the Honorable Judge Briles at that time asserting to her at a hearing that was held approximately April 16th on the early morning session before a date which I was on trial, and I set forth at that time some new information that now in fact I was on trial, that there was no question

about the fact that I was going to be engaged for three weeks, and that I was in fact the only lawyer that was really competent and capable of handling that case, and I had worked on that case for a long time.

And looking at page 3 of my motion, I won't state all the things that were brought out at that hearing, but I did advise the Court of each of the items that we see, subparagraphs 8a through 8h and asked Judge Briles for relief at that time, and she advised that she would take the matter under advisement.

I was under the belief at that time that the Court would grant relief. In fact, the Court indicated and suggested some possibilities of resetting the trial date. A discussion was even held about possibly putting it over till May or even to June. There was opposition on behalf of my opponents in this regard. The Court then,

of course, said that she would take the matter under advisement and rule the following Monday.

The following Monday came and she did rule, again denying that motion and setting forth a number of things in the order at that time.

I got news of that the following day, on the 22nd. Again, I was on trial continuously from 9:00 until approximately 5:30 each day, and of course I actually put on 22 witnesses and had Lousberg as primary counsel, and I was interviewing doctors who were flying in every night and every morning and working 18 - to - 20 hour days all the time I was on trial. In any event, monitoring the events here and unable to participate in preparation of any of the final pretrial submissions or of any of the discovery that was suggested by my opponents at that time.

But when I did learn of the hearing denying my reconsideration for Motion to Continue, the Court will recall that on Wednesday, April 23rd I approached Your Honor on that morning again before nine o'clock -- that was not a noticed hearing, and of course other parties did not have an opportunity to present themselves - but I introduced myself to the Court for the first time, having not met Your Honor, and advised the Court that I was indeed in a very significant dilemma and that I would not be able to try the case nor would anyone else be able to try this case and that I was indeed on trial and would remain on trial past the April 28th trial date.

And in fact this Court advised me at that time that the Court did not feel that he was in position to overturn or overrule the previous court orders, and that indeed he felt that -- you felt that my only relief was to seek an interlocutory appeal to the

Supreme Court. That I at that time instructed my office to take that very action, and that on the 25th of April an appeal was express mailed to Des Moines, Iowa and in fact was filed the following Monday, the following working day, on the 28th. At what time I'm not quite confident.

The -- as the Court is aware, then the matter then did come before Your Honor for trial on the 28th. I did not appear. Mr. Allan Hartsock appeared in my stead. I was compelled to be on trial on that date. I was still presenting evidence on my case at that time. I in fact spent the whole morning with my final expert who had flown in the night before late and we were preparing that day. And I was unable to be here and prevent any further motion. But the Court advised me that no motion was going to be considered for continuance at that time in any event. Since that time, Your Honor, then I have presented this

motion here. And I also would like at this time to ask leave to -- well, I have filed a stamp file, but I have an affidavit of Bonnie Krugman which has not been submitted to the other counsel for which I have copies, which only addresses one critical point that I feel I'd like the Court to consider.

And that is the position I take in -- in my motion. This is only supportive. This isn't anything new. In my motion wherein I state that the nature of this case, the Krugman versus Palmer College case, is not an ordinary tort lawsuit, nor is it an ordinary personal injury case. It is in fact a complicated and somewhat difficult case to handle and to manage. It requires not only special expertise of physicians and chiropractors with respect to the issues of causation and with respect to the issues of departures from not only chiropractic care but medical care, but

that it requires the unique experience and knowledge of an attorney who has had a background and experience and some competency in handling these type of cases, particularly when faced up against the competency of the other three attorneys who have been working on a case of this magnitude for three or four years.

That it was in fact my client's position all along during this case that she desired that I be lead counsel, because she had confidence in my ability to present her case, and that her efforts even prior to engaging my services were met with frustration and despair in securing the willingness of other attorneys who did not have experience and competence in handling these type of cases. In fact, they had declined to represent her, and she was advised that a specialist was necessary in order to handle such a case, and that is the reason really that I was brought

into this lawsuit by and through the law firm of Winstein, Kavensky, Wallace & Doughty who have been co-counsels with me in this case.

But at no time has that law firm or any of its members ever been involved in the preparation of this case or in taking any of the critical depositions or in handling any of the litigation, strategy or preparing or engaging any of the experts or developing this case for the purposes of trial. And that no one in my law office is of equal competence or marginal competence to handle these type of cases, and that it was really my client's desire and -- to have me try this lawsuit. And I think that the point I'm trying to make, Your Honor, is that -- that it was suggested to me by Judge Briles that perhaps co-counsel or other counsel should have been prepared or should be -- or should in fact have tried this lawsuit in my stead.

And my point there, your Honor, is that in this type of a case that would have been a grave injustice and prejudice to my client. Principally because there was in fact no one who was capable of picking up the labor in this case and handling this case competently, not against the quality and the experience and the abilities of these three gentlemen to my left. That in fact the Plaintiff's case would have been severely compromised had anyone else other than myself been required to even prepare the pretrial submissions, the instructions, the motions in limine, the objections to the submission of evidence, of the exhibits. All of these things were critical. They were not nominal events or insignificant items that needed to be attended to or could have been attended to by a subordinate.

And I was involved in another equally compelling case in which I was working

18-hour days on. So that in the event here that each of these orders that was entered from January 1st through January 8th and -- not January, I'm sorry, April 1st through that month, orders compelling submissions, each and every one of these situations where it was impossible for me or anyone who was capable to meet those deadlines. And I attempted to address that problem with each and every hearing that was held.

I think, Your Honor, that the most significant prejudice here is that the decision to dismiss this lawsuit with prejudice when in fact a Motion for Continuance was made for the first time, under the circumstances has caused a grave injustice to an Iowa resident, an Iowa resident who in fact I feel is entitled to her day in court despite the fact that certain problems and impossibilities are created by either the system or by the attorneys that have been designated to represent parties. And that

Bonnie Krugman's case is indeed a meritorious case, that she has suffered an incredible injury, paralysis and disability as a result of the events that have been alleged in this case, and that prior to the dismissal of this case there was indeed competent testimony that was available to establish the burden of proof on behalf of the Plaintiff.

And that, Your Honor, I think that to deny her her day in court and to deny the first request for continuance and to buttress that denial of a continuance as the record would reflect, perhaps on the basis that the Defendants were underinsured or not adequately insured or were in fear that there may be an excess judgment over and above a policy of insurance, is not just and should never be the basis of a denial of continuance, not particularly of a Defendant such as the Palmer College who obviously has an operating budget

annually in the millions of dollars and could adequately respond and is in fact self-insured over and above its policy limits.

The point being, Your Honor, that the circumstances which led to this dismissal and led to the inability of myself and co-counsels to meet the flurry of activity and demands that were being made on this case during the month of April, and I submit even the last week of March, created a circumstance which no one --no one capable of handling this case could have met. And that only prejudice and a denial of a fair hearing and a fair opportunity to be represented by competent counsel would have resulted had this case been pursued or required to proceed to trial with substitute counsel.

Your Honor, I probably said enough and I'm going to stop. I will address anything that the Court would request at this time.

THE COURT: Thank you. One thing you did say, that is, that you were talking about the dismissal being with prejudice. It was not. The cause was hereby dismissed but it was not dismissed with prejudice.

MR. O'MALLEY: I understood that to be with prejudice.

THE COURT: The dismissal -- what I'm saying is, I said that the order itself did not state the words "with prejudice" as to what the effect was because of the fact of strike notices or whatever the case may be. You know, I'm not in a position to address at this time, but it was just a dismissal. But that's neither here nor there. I just thought I'd let you know that particular fact.

Mr. Lambert, do you want to speak to your resistance to Mr. O'Malley's motion at this time?

MR. LAMBERT: Yes, Your Honor, we filed a written resistance on May 21, 1986, and

I believe there's no reason to at this point go over the rulings of Judge Briles on the Motions to Continue and the Motion to Reconsider. I believe the record has been made fairly clear by the pleadings that have been filed by counsel and by the reasoning of Judge Briles in denying those particular motions.

It appears at this time that Mr. O'Malley is attempting to supplement whose Motions to Continue by filing the affidavit of Bonnie Krugman, which certainly Judge Briles did not have before her at the time she was making the ruling and at the time that she was finding that the Winstein firm is a competent law firm and is certainly competent to try a case of this manner.

Further, I would point out, Your Honor, that I cannot respond specifically as to my own personal knowledge on what took place in the Illinois trial that Mr. O'Malley has referred to. We have attached to our

resistance the affidavit of John Robertson, who is the attorney for Dr. Stegmaier, who is the opposing counsel to Mr. O'Malley who has responded specifically to claims that he has made in this Motion to Vacate concerning the Illinois trial. And I believe that his affidavit speaks for itself, and I will not go into that in depth. I've quoted certain portions of it in my resistance and have attached that affidavit.

Finally, Mr. O'Malley did point out earlier about the dates that were set for -- by Judge Kelley in his order on when experts had to be revealed. I should point out to the Court that the order specifically states that those are agreed upon dates by the parties and therefore should not now be used in -- as an excuse as Mr. O'Malley is using at the present time. Further, I point out that the application that I filed in this matter had dates set

earlier, but the agreed dates were dates based upon discussions with Mr. O'Malley and dates that he wanted to use for the readiness schedule.

We have also responded specifically to the allegations that Mr. O'Malley had not mentioned orally, but he did put into his Motion to Vacate, concerning the deposition of Dr. Casel. I have attached to my resistance an affidavit that I have prepared which sets forth letters concerning how this particular deposition was set out, and that I believe the claims of misrepresentation and fraud have no basis and fact, and I believe that the -- the deposition was taken in good faith and that it was a deposition that Mr. O'Malley had plenty of time to take if he wanted to take Dr. Casel since the beginning of the lawsuit. And that any objection that he now raises in his Motion to Vacate concerning that particular deposition has been waived, and

that it was not made in a timely manner and it certainly cannot be raised in a Motion to Vacate at this time.

I would further submit that I do not believe that there has been adequate showing under the Iowa Rules of Civil Procedure to entitle the Plaintiff to vacation of this particular dismissal order. There has been no specification of the particular rule of civil procedure that is being relied upon in this matter, and the only one that we could believe that would even be close would be under Rule 244, and there have been no specific allegations under the specification of causes that we believe fit within Rule 244 and would submit that in a situation like this you also have to look at the interests of the Defendant. And I believe that the Court has done that.

Judge Briles did that in her rulings, and I believe that this Court has done that in the ruling of dismissal in that the

Defendants are entitled to protections just as the Plaintiff is entitled to protection, and I believe that is one of the bases for the ruling of the Court, and that that ruling should not be vacated.

THE COURT: Okay. Mr. Egbers, do you have anything to add?

MR. EGBERS: No, Your Honor. We would simply adopt the statements and arguments of Mr. Lambert.

THE COURT: Mr. Liebbe?

MR. LIEBBE: We would adopt the written resistance and Mr. Lambert's statements on behalf of Dr. Rhodes.

THE COURT: I do note and it was an argument put in the resistance and one that was just made, Mr. O'Malley, and that is in your Motion to Vacate you move this Court pursuant to the Iowa Rules of Civil Procedure to vacate this order, you know. But I'm not sure under which rule we're proceeding. Have you had an opportunity

to look at that ruling and determine what the situation is as far as whether it is under Rule 244? Have you had an opportunity to look at the - MR. O'MALLEY: Well, I haven't looked at 244 specifically, Your Honor. I looked at perhaps the Federal rules and some of that I was proceeding substantially on in the similar rules.

THE COURT: 244 is our Motion for New Trial is what it is. I'm just a little confused because it could be under 253 or 252. But I assume it's under 244, and we'll assume that I guess unless I hear otherwise as far as it's concerned.

If you want to have an opportunity to look at it right now, I'm perfectly willing to have you take a look at that.

MR. O'MALLEY: Perhaps I might want to do that, Your Honor.

THE COURT: Sure. Here it is.

MR. O'MALLEY: Thank you. Your Honor, my position is that the motion should be

considered under both rules, both 244 and 252. I'm not confident which rule may be preferential in this respect, but there are certain elements of Rule 244 which are not a part of this case and in 252 that are not a part. But as I read both of these rules, there are grounds that are stated in here which I think substantially are stated in my motion.

THE COURT: And there are some very broad grounds under 244 I'll have to admit.

MR. O'MALLEY: That's true. And it gives the Court perhaps a great deal of discretion with respect to granting new trials under circumstances that are just. And I would -- for the record, I would like to have the Court consider this motion with respect to both rules, both 244 and 252.

THE COURT: Okay. Do you have anything further to add?

MR. O'MALLEY: The only thing further is that he said he had a submission, a res-

ponse to my motion. I've never seen it. If it was filed on the 21st I've never received it. And I know nothing about affidavits from other lawyers, and I'm not in a position to even address that having never been provided it.

With respect to my request in the motion, I did not address it initially and Mr. Lambert did touch on it, and that was discretion about the evidence deposition. I did, as a part of my motion, ask the Court to vacate in addition that portion of the order which allowed the submission of various deposition transcripts to be admitted into evidence because of the failure to file some specific objections, and of course I did address that fact that I was unable to do that because of my incapacity or my engaging in another case. But I wanted to address this particular item with respect to Dr. Neil Casel and explain to the Court what I mean by misrepresentation

and fraud with respect to the conduct of that deposition.

THE COURT: Would you slow down just a little bit so my reporter -- as you know, they work pretty hard. And you've just got to slow down a little bit.

MR. O'MALLEY: If you would forgive me. I'm sorry.

I think the Court should be made aware, although there was a number of efforts to try to schedule Dr. Neil Casel's deposition, I was in agreement that we should try to do it and do it in the most expeditious manner and to do it in the manner that was least inconvenient, not only to the doctor, but to all the parties. And for about six months or maybe even longer there were many discussions as to how this might be accomplished. But that defense counsel were able to convince Dr. Casel that it would be possible to take his deposition when he was going to appear in St. Louis, ap-

parently attending a seminar, because he lives in the East. Someplace in North Carolina or South Carolina. And that I had agreed that we would proceed, pursuant to a notice that was filed, proceed on a Friday at 2:30 p.m. in the afternoon with defense's request to take his deposition for the preservation of testimony at trial.

Prior to the date of the deposition I in fact sent out a notice to take a discovery deposition, and I scheduled that at 1:30, one hour prior to the time that they had requested a deposition. The morning of that date I had flight plans and scheduled to be there, and in fact there are many many flights from Chicago obviously to St. Louis. And I was in my office during the morning hours planning then to proceed to the airport in anticipation of these depositions when I received a call from either Mr. Lambert or one of the other gentlemen here advising me that Dr. Casel

has informed them that morning of a problem, that he was in fact fogged in at his local airport where he was intending to proceed to Washington, D.C. to catch a flight from Washington to St. Louis. And then it appeared that he would not be able to be present for the scheduled deposition, either at one-thirty or at two-thirty, and that it was -- it was unclear to him as to how soon he would be able to get there, but tentatively it would probably be four-thirty before he might even be able to arrive at the St. Louis airport.

When I heard that I felt I'd better talk to the gentleman myself. I in fact got a phone number and I was able to reach directly Dr. Casel and speak to him around ten-thirty that morning, the day of the scheduled deposition. And during that conversation he reiterated again the problem that he anticipated and he was unsure as to what time he would be able to get in,

but it was certain that he would not be able to meet the time table that was originally imposed, either the deposition at one-thirty or two-thirty. And he advised me again that it would probably be four-thirty or so before he would even be able to get into St. Louis.

A further discussion was held because of my familiarity with respect to the hotel downtown where he was going to attend the seminar and where the deposition was scheduled, that on a Friday afternoon he was perhaps forty-five minutes to an hour even getting from the airport to that location -- and the upshot of it was that it would be five-thirty or later before he would even be able to be present at the hotel. At that point Dr. Casel informed me very emphatically that he had a dinner engagement where there was going to be a speaker as part of this seminar activity that he was required to be at, and that under no circum-

stances was he not going to be there, that he was required to be there and he was going to be there and no depositions were going to be held for the purpose to substitute for his obligations with regard to being at that dinner at five-thirty.

And the impression that Dr. Casel left with me was that there wasn't going to be any way that the attorneys could agree to reschedule this deposition at any time that would be convenient to this doctor unless we discussed the possibility of doing it the following day or perhaps on Monday. And that when Dr. Casel told me that he was not going to be participating in a deposition after five-thirty because he had other engagements, I then called Mr. Lambert and advised him of the information that I had learned, and Mr. Lambert suggested because he and his colleagues had already come to St. Louis and had gotten a hotel room the night before and was sitting there

waiting for his deposition session, that since they were there they were going to take their chances and wait for the doctor to arrive and see if they could talk him into taking a deposition.

THE COURT: Now you at some time called here, too.

MR. O'MALLEY: I haven't gotten to that, Your Honor.

When he told me -- Mr. Lambert told me at that juncture that I better just get my tail down there, because we're going to work this out somehow, and I says -and I told Mr. Lambert at that point not only did I have some other important plans that evening, that I thought it was unreasonable and unfair under these circumstances for me to have to speculate on our ability to talk to Dr. Casel, an otherwise hostile witness, not only to them, but to me. He never really wanted to cooperate with this thing to begin with. And for me to get

in a plane and come down and wait around with him on that notion was foolhardy. And I told him that, and he insisted that they were going to take his deposition and that I could deal with it at my own peril.

I then advised him that I would call the chief judge in Scott County to quash the notice of deposition and attempt to get some relief from this Court and to set up a conference call for the purposes of a hearing upon that motion. Which in fact I did call the Court and it took me fifteen, twenty minutes before I was connected to Judge Havercamp who advised me that he was alone that day, that he had apparently a chambersfull or either a courtroomfull of lawyers and that it was impossible for him to set up a conference call, that he was going to have to work through lunch just to deal with his case load that day, and that he would not be able to hear any emergency motions, and he was unable to set

up a conference call. He did agree -- he did admit to me that he was sympathetic to the situation and he suggested that we try to work the thing out as best we could.

I told Mr. Lambert that I was going to make that phone call and that I was going to try to do it. I called Mr. Lambert back again, told him specifically what I just apprised the Court and further reiterated to Mr. Lambert the unreasonableness of trying to proceed on the speculation that Dr. Casel was going to somehow cooperate with us and maybe submit to a deposition sometime at nine or ten or eleven o'clock at night. I then proposed again at that point that I would be available to proceed anytime the next day on Saturday 'cause I would assume that we might be able to work something out with Dr. Casel that day, assuming that he had to be there that entire day and perhaps even Sunday for his seminar.

I also suggested to Mr. Lambert that I would be available Monday morning to take that deposition in the event that Dr. Casel was tied up for the whole weekend, and that Monday morning could be arranged for the deposition. And Mr. Lambert advised me that after speaking with the other two gentlemen here that they all had other plans to be in other places on Monday and that it was impossible for them to do so. I then advised Mr. Lambert that a two-thirty noticed deposition and one-thirty noticed deposition had some meaning, that I felt that it would be impossible for us to get his deposition and I was not going to come down there on his speculation. And he told me they were going to proceed in any event.

THE COURT: Thank you. Do you have anything to say in response?

MR. LAMBERT: Yeah, I do.

Dr. Casel was a treating physician of Bonnie Krugman; that he certainly could

have or should have talked to the treating physicians prior to filing the lawsuit. I would also point out that a -- we had a letter from Dr. Casel saying that there was no causal connection between the chiropractic treatment received at Palmer College of Chiropractic and the injury that Mrs. Krugman suffered. That that was attached to a Motion for Summary Judgment that was filed on February 1, 1984.

That Mr. O'Malley on February 13, 1984 filed a Motion for Extension of time to file an additional response to that Motion for Summary Judgment. He specifically requested -- and this is back in February of 1984 - that he have the opportunity to depose Dr. Casel among other people prior to responding to the summary judgment. And he got a 60-day order from Judge Briles to allow him to do that.

He did not take Dr. Casel's deposition at that time even though he took two of

the other depositions he wanted. He made the decision that he was not going to respond to the summary judgment by deposing Dr. Casel. I have attached my affidavit that sets forth the efforts which I have made to arrange for the deposition of Dr. Casel, which goes all the way back to January 28th.

I should further point out that Dr. Casel at the time he treated Bonnie Krugman was at the University of Iowa Hospitals. During the time that this lawsuit was going on Dr. Casel left the University of Iowa and went to the University of Virginia in Charlottesville. I have adequate documentation in my affidavit as to the extent of the efforts we went through.

I should also point out that the defense counsel went to St. Louis, took a seven o'clock in the morning flight to be in St. Louis, and we booked the very last flight we could get Friday evening

so that we would be available under any contingency. That we received -- Mr. Egbers' secretary received a call from Dr. Casel on the morning the deposition was supposed to be held that he was being held up but that he was going to come and have his deposition taken. We were called at St. Louis, and as a further courtesy to Mr. O'Malley, called his office to inform him about the delay so that he could arrange his flight accordingly.

I was told by Mr. O'Malley's secretary that he was in court at that time. He did call me back. We did have these discussions, and it was our position that the depositions had been noticed, we were there, we had made all the arrangements for this to take place. We had a room set up for the deposition to be taken, we had incurred expenses, and we were there and we intended to take the deposition.

Dr. Casel showed up. He showed up late because of the problems with flights, just like the problems Mr. O'Malley has had with flights. We all understand that. We took the deposition. He of his own choice decided not to come to that deposition.

Dr. Casel showed up. He showed up late because of the problems with flights, just like the problems Mr. O'Malley has had with flights. We all understand that. We took the deposition. He of his own choice decided not to come to that deposition.

Further I would point out that if he had an objection to that deposition he had from the date it was taken until the trial date of April 28th to file an objection to it. There was no objection ever filed until this Motion to Vacate, which is filed after the judgment is already entered. I would submit quite clearly that he has

waived any objection that he has by not timely making it, and further that there's no basis in law or in fact for his deposition, and therefore it certainly adds no support for his claim to the Motion to Vacate. The objection could have been made and should have been made under the court orders to file objections to exhibits. Mr. Hartsock sat at that table and did not object to the offer of the deposition of Dr. Casel. Clearly we have a waiver, and it's certainly improper to raise that at this time.

THE COURT: Well, I want to hear everybody's side.

Did you want to respond? Briefly and slowly.

MR. O'MALLEY: The Court should be made aware that Dr. Casel's deposition commenced at 6:30 p.m. on that Friday. The circumstances for which they were able to corral this gentlemen to get him to agree

to it are completely unknown to me. But I think the Court should realize that that deposition took perhaps 30 minutes or less, and I have a feeling that that's how they got him to agree to extricate himself from another commitment, because they promised him that the deposition would take no more than 30 minutes.

I can assure this Court that had I been there and had a right to cross-examine, which I think is my fundamental right, that that deposition would have taken three hours minimum, and under those circumstances I really seriously doubt whether we would have any of us gotten the cooperation of Dr. Casel to submit to a three-hour deposition at six-thirty on a Friday night in the middle of another obligation. And that's why I made the suggestion to him and these gentlemen that we do it on a Saturday or Monday.

The fundamental problem here is that I have been denied the right to cross-examine a key witness, a witness who they were able to elicit opinions on the ultimate issues without any discussion, without any background, without any cross-examination and then to be allowed to submit this into evidence. And they submitted this -- their motion to submit this into evidence was on April 28th which when I submit Mr. Hartsock was unaware of the facts of this case, unable to make a judgment because I, handling this case, was not here to do that.

THE COURT: I understand.

MR. O'MALLEY: That's all I have, Your Honor.

THE COURT: The matter is submitted? Thank you.

(WHEREUPON, the proceedings were concluded.)

APPENDIX 4

IN THE SUPREME COURT OF IOWA

No. 86-896

BONNIE KRUGMAN,

Plaintiff-Appellant,

v.

PALMER COLLEGE OF CHIROPRACTICS, WARREN RHODES, D.C., and PATRICK T. KEEFE, D.C.,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HON. MARGARET S. BRILES and
HON. EDWARD B. DeSILVA, JR., Judges

APPELLANT'S BRIEF

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CERTIFICATE OF FILING

I, Paul R. O'Malley, hereby certify that I will file the attached Appellant's Brief by mailing 18 copies thereof on December 27, 1986 addressed to the Clerk of the Supreme Court, Statehouse, Des Moines, Iowa 50319

/s/
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CERTIFICATE OF SERVICE

I, Paul R. O'Malley, hereby certify that on December 29, 1986, I served the attached Appellant's Brief by mailing two copies thereof to Robert D. Lambert, attorney for defendants-appellees.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. WAS THERE AN ABUSES OF DISCRETION BY THE TRIAL COURT IN FAILING TO CONTINUE THE FINAL PRETRIAL, THE TRIAL, AND IMPOSING SANCTIONS BY BARRING PLAINTIFF'S EXPERTS, AND DISMISSING THE CASE?

Sullivan v. Chicago & Northwestern Trans.,
326 N.W.2d 320 (Iowa 1982);

Suckow v. Boone State Bank & Trust Co.,
314 N.W.2d 421 (Iowa 1982);

Smiley v. Twin City Beef Co.,
236 N.W.2d 356 (Iowa 1975);

Fox v. Studebaker-Werthington, Inc.
516 F.2d 989 (8th Cir., 1975);

McQuillen v. City of Sioux City,
306 N.W2d 789 (Iowa 1981);

Department of General Services, State of Iowa v. R.M. Boggs Co., Inc.
336 N.W.2d 408 (Iowa 1983)

R.E. Morris Investments, Inc., et al. v. Lind.
304 N.W.2d 189 (Iowa 1982);

Coburn v. Domanosky,
257 Pa. Super 474, 320 A.2d 1335 (1978);

State ex Rel. Parcel v. St. John,
308 N.W.2d 8 (Iowa 1981)

STATEMENT OF THE CASE

Nature of the case: This is an appeal by plaintiff, Bonnie Krugman, from the orders of two judges involving discovery limitations, sanctions and the dismissal of her case, and the denial of her motions to vacate these orders.

Course of proceedings: On September 1, 1982 plaintiff filed her petition at law sounding in chiropractic negligence against four defendants: Palmer College of Chiropractics, Warren Rhodes, a student-chiropractor, Patrick T. Keefe, and Ron Ashe, both licensed chiropractors. Appendix 7-12 [hereinafter cited as App.]. Defendants answered. App. 13-116. After a trial setting conference, the case was ordered removed from the strike list and trial was set for April 28, 1986 with a settlement conference for April 10, 1986. App. 19.

On January 28, 1986, Judge Kelly set dates for closing the pleadings, the comple-

tion of discovery and listing of expert witness. App. 22. On April 1, 1986, Judge Briles ordered that the plaintiff supplement her answer to an interrogatory regarding the identity of her experts. Further, the Court ordered the plaintiff to make available those experts identified for their depositions prior to trial. App. 31-32.

On April 8, 1986, plaintiff filed her motion to continue the final pretrial conference and trial setting. App. 33-37. Judge Briles issued an order stating "[N]o good cause is shown for a continuance." App. 37.

The judge's order denied the application for continuance, canceled the settlement conference, ordered the trial documents as required by District Court Rule 7.1B(2), (3) and (4) to be on file no later than April 21, 1986. App. 35-39. The plaintiff filed a motion to reconsider her application for continuation of the trial setting.

App. 40-43. At the same time the defendants filed motions for sanctions, App. 45-50, 51-59, and a resistance to plaintiff's motion for reconsideration. App. 60-66.

Judge Briles heard these motions on April 21, 1986 and denied plaintiff's motion to reconsider and continue and, further ordered the defendants have leave to take the discovery depositions of plaintiff's experts and continued the motions for sanctions. App. 66-71. The defendants' motions for sanctions were renewed. App. 72-100.

In the meantime, plaintiff's counsel had begun trial in the Circuit Court of Rock Island County in the State of Illinois in the case of Van Hootegem v. Stegmaier on April 14, 1986 which lasted until May 5, 1986. With a pending trial date of April 28th for the case at bar, plaintiff's counsel attempted to stay the proceeding and reverse the adverse rulings to the motions for a continuance by filing an Application for Appeal from Interlocutory Orders.

App. 101-109. April 28th having arrived and the Iowa Supreme Court not yet in possession of plaintiff's appeal the trial court granted defendants' motions for sanctions by barring plaintiff from presenting her experts' testimony at trial and dismissing plaintiff's petition. App. 116. This dismissal by the trial court was pursuant to Iowa Rule of Civil Procedure 134. App. 116.

Plaintiff next filed a Motion to Vacate Dismissal Order and the Order of Sanctions of April 28, 1986, (App. 119-134) defendants' filed their Resistance (App. 135-179), and the Court denied plaintiff's motion. App. 180-181.

Disposition in the trial court: Plaintiff's Petition at Law was dismissed pursuant to Iowa Rule of Civil Procedure 134 on April 28, 1986. App. 110-117. Plaintiff's Rule 244 and 252 motions to vacate the dismissal order and order of sanctions

of April 28, 1986 were denied on May 27, 1986. App. 180-181.

Facts: Plaintiff, Bonnie Krugman, filed her Petition based on chiropractic negligence of Palmer College and three other named chiropractors. Having experienced a series of recurrent headaches, Bonnie Krugman sought the care and treatment of a chiropractor, Warren Rhodes, who performed a chiropractic adjustment which included a cervical spine manipulation. App. 8. Soon thereafter, Ms. Krugman experienced an arterial venous malformation, or stroke, which necessitated brain surgery and left her permanently paralyzed on the left side of her body. App. 10. Plaintiff commenced litigation on the general theory of negligent chiropractic care and treatment and, more specifically alleging that Dr. Rhodes failed to properly screen the plaintiff and rule her out as a potential stroke victim, failed to perform a spinal column

stress analysis, failed to take a proper history and performed cervical manipulation that was contraindicated for the plaintiff's history and symptomatology. App. 8.

The Palmer College of Chiropractic, Patrick T. Keefe, D.C., and Ron Ashe, D.C., were named as defendants for failing to properly train a student-resident, Warren Rhodes, in screening and diagnostic testing for the appropriateness of cervical manipulation. App. 10. Further allegations included the failure to institute a protocol to identify potential stroke victims as a preliminary screening method and failure to supervise and instruct their student-residents. App. 10. Dr. Ashe was granted summary judgment on April 14, 1986 and is not involved in this appeal.

The plaintiff, Bonnie Krugman, had retained the services of Attorney Paul R. O'Malley because of his expertise in handling cases of professional medical and

chiropractic negligence. App. 134. In the Bonnie Krugman affidavit, (App. 134) which was filed in support of Plaintiff's motion to vacate the Rule 134 dismissal, she stated that Mr. O'Malley as the malpractice specialist would act as lead counsel with respect to all substantive matters, trial preparation and trial. App. 134. Mr. O'Malley filed the Petition on September 1, 1982 and personally handled every facet of the litigation. App. 223. The case of Krugman v. Palmer College, et al. was set for trial for April 28, 1986. App. 19. Concurrently running with the final trial preparations for the Krugman case was the matter of Van Hootegem v. Stegmaier, M.D., 31 L 128, pending in the Circuit Court of Rock Island County, Rock Island, Illinois before the Honorable Judge Edward Keefe. App. 130. This case involved a drug reaction to a woman who became paralyzed and totally disabled. App. 218.

The plaintiff in the Van Hootegem case is brain damaged with 80% paralysis of her legs, 20% paralysis of her arms, confined to a wheelchair and financially destitute. App. 130.

On January 28, 1986, Judge Kelly in the Krugman case, ordered the plaintiff list all expert witnesses she intends to call on or before February 28, 1986 (App. 22), ordered the defendants to list all expert witnesses they intend to call on or before March 14, 1986. (App. 22); ordered the closing of pleadings on March 31, 1986 (App. 22); ordered the completion of discovery on April 14, 1986 (App. 22) and ordered these dates to comprise the readiness schedule for the trial to be held on April 28, 1986. App. 22. As a result of these orders, six experts not previously identified were disclosed three for plaintiff and three for the defense. Plaintiff complied with disclosure by naming her experts. App. 28.

Concomitant with the final trial preparations in the Krugman case was the trial setting in the Van Hootegem case set during a pretrial on January 30, 1986 for April 14, 1986. App. 33, 40-41, 119, 143, and 215. Plaintiff's counsel, Paul R. O'Malley, has stated on the record that he "believed at that time that I had scheduled this case (Krugman) and agreed to have this matter proceed in April that I had no conflict whatsoever in April." App. 215. Mr. O'Malley stated during the May 23, 1986 hearing to vacate the dismissal of Krugman and the barring of her experts that it was his belief that the Van Hootegem case would end prior to April 28. App. 216. It was his belief that the Van Hootegem case would end prior to April 28. App. 216.

At the January 30th pretrial in Van Hootegem, the trial court granted the use of another expert for the defense. App. 143, 216. In early April, 1986 the

court in the Van Hootegem case expanded the issues in the lawsuit with regard to contributory negligence and causation. App. 216. This opened up new avenues for additional experts and new issues for then existing experts to opine about. App. 216. The final ten days prior to the initiation of the Van Hootegem trial involved a great deal of trial preparation. App. 216. Two evidence depositions of physicians and experts were taken in early April. App. 144. Because of this expansion of the lawsuit and introduction of issues, the final trial preparation occupied all of Paul R. O'Malley's time in April and the trial of Van Hootegem lasted for three weeks. App. 216.

Mr. O'Malley on behalf of the plaintiff in the case at bar, filed a Motion for Continuance on April 8th. App. 33-34, 217. Time was needed to take the depositions of the three experts disclosed by the defen-

dants on March 15th; time was needed to take the depositions of the three experts disclosed by the defendants on March 15th; time was needed to take the depositions of plaintiff's experts disclosed on February 28th; and time was needed for the final pretrial submissions. App. 217. Judge Briles denied this request for a continuance. App. 35-39. Subsequent thereto plaintiff filed a Reconsideration of Application for Continuation of Trial Setting and For Extension of Time to Complete Discovery. App. 40-43. Attached to this Motion is the affidavit of Dr. Neil Allen, one of plaintiff's experts, who stated that there was a causal relationship between the chiropractic cervical manipulation and the cerebrovascular accident or stroke. App. 43. Plaintiff's counsel, Paul R. O'Malley, again recited the conflict between the Krugman trial setting and the Van Hootegem trial. App. 40. Again, it

was disclosed to the court that six experts had been retained, three by the plaintiff on February 28th and three by the defendants on March 15th, and that five of these experts resided outside the jurisdiction. Also, profound seriousness of Bonnie Krugman's injuries was pointed out to the court and that it would be manifestly prejudicial and unjust to the plaintiff to deny a request for additional time for the completion of discovery and an opportunity to fully prepare the matter for final pretrial settlement conference and trial setting. App. 41. This motion was taken under consideration by Judge Briles and denied. App. 67-71. In this order, Judge Briles noted she had a conflict of interest and would not be the trial judge. App. 70-71. Moreover, Judge Briles took notice of the insurance coverage situation of defendant Warren Rhodes and the Palmer College of Chiropractic. App. 69.

On April 28, 1986 Judge de Silva, used the ultimate sanction available to the court and dismissed plaintiff's case,. App. 110-117. Plaintiff had made it very clear up until this time of the various discovery problems in the case, that he would be on trial in another jurisdiction, and the need for more time to prepare the Krugman matter. All to no avail, the trial court adopted the defendants position on their prejudice because of the plaintiff's failure to comply with orders. Finally, plaintiff filed a Motion to Vacate Dismissal Order and Order of Sanctions of April 28, 1986. App. 119-124. In this motion, the following salient points were made: circumstances rendered it impossible for plaintiff's chosen attorney to be in attendance of the trial and prepare critical pre-trial submissions; plaintiff has never made a previous request for a continuance; plaintiff's request was for no more than six or seven weeks but

that any date available to the defense counsel would have been acceptable to plaintiff; defendants only prejudice, if any, in the trial continuance is the continuance of pre-judgment interest which would ordinarily be stopped on a date certain upon proper motion filed by defendants; that the representations of the defense counsel that the Palmer College and Warren Rhodes were only covered by a policy of insurance of $100,000.00 should never be an issue or the basis of such severe sanctions as denial of a trial and right to chosen counsel to represent plaintiff at trial. App. 123-124. Attached to this motion was the affidavit of the plaintiff herself, Bonnie Krugman, indicating that she retained Paul R. O'Malley to represents her in this case because of his expertise and experience in handling medical and chiropractic negligence cases; that prior to her retention of Mr. O'Malley as her attorney that she

was informed by several local counsel that they lacked experience and would not feel confident to act as primary attorney in handling this case; and that although she engaged the legal services of both Mr. O'Malley and the law firm of Winstein, Kavensky, Wallace & Doughty, it was only with the understanding that Mr. O'Malley as the malpractice specialist would act as lead counsel with respect to all substantive matters, trial preparations and trial. App. 134. This motion was denied and, hence, this appeal was taken. App. 180-181.

ARGUMENT

Division I. THERE WAS AN ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT IN FAILING TO CONTINUE THE FINAL PRETRIAL, THE TRIAL, AND IMPOSING SANCTIONS BY BARRING PLAINTIFF'S EXPERTS, AND DISMISSING THE CASE.

By this appeal plaintiff contends that the orders entered by Judge Briles on April 9, 1986 denying plaintiff's motion to continue the final pre-trial conference and remove the case from its trial setting and continue the trial; the April 21, 1986 order entered by Judge Briles denying plaintiff's motion to reconsider the application to continue the trial date; the order of April 28, 1986 entered by Judge de Silva entering sanctions against the plaintiff by precluding her from expert testimony and dismissing her petition; and the order entered on May 27, 1986 by Judge de Silva denying plaintiff's Rule 244 and 252 motions to vacate the dismissal order and order of sanctions were all entered as a result of an abuse of discretion by the trial court.

The basic rule of sanctions is that the imposition of sanctions by the trial court is discretionary and will not be re-

versed unless there has been an abuse of discretion. *Sullivan v. Chicago and Northwestern Trans., 326 N.W.2d 320 (Iowa 1982). However, where the sanction selected by the trial court is dismissal of the action, the range of discretion is narrowed. Suckow v. Boone State Bank and Trust Co., 236 N.W.2d 356, 360 (Iowa 1975). In order to justify dismissal of the action, a party's noncompliance must be due to willfulness, fault, or bad faith. Fox v. Studebaker-Werthington, Inc., 516 F.2d 989, 993 (8th Cir. 1975); McQuillen v. City of Sioux City, 396 N.W.2d 789, 791 (Iowa 1981); Smiley, 236 N.W.2d at 360; Sukow, 314 N.W.2d at 425. Plaintiff contends that the basic err of the trial court, both Judge Briles and Judge de Silva, was that whatever noncompliance occurred in getting the discovery done and making preparations for trial, none was due to willfulness, fault, or bad faith.

The record is abundantly clear that plaintiff's counsel, Paul R. O'Malley, had a simultaneous medical malpractice-drug reaction trial set in Rock Island County in the State of Illinois in April of 1986. App. 33-34, 40-43, 101, 119-124, 214-221. As soon as he became apparent of the conflict in trial settings, plaintiff's counsel filed a motion for continuance. App. 33. Plaintiff contends that the trial court abused her discretion in not continuing the trial at that time pursuant to Iowa Rule of Civil Procedure 181.3(b). In her order of April 9, 1986 denying a continuance Judge Briles stated that "all fault and neglect in this case has been by the plaintiff." App. 37. Judge Briles abused her discretion in making this finding and this cause must now be resurrected by the appellate court in order to preserve the right of jury trial for the plaintiff.

There have been several instances where the Iowa appellate courts have reversed the trial court for an abuse of discretion even though the trial court made a finding of willfulness, fault or bad faith. The case of Department of General Services, State of Iowa, v. R.M. Boggs, Co. Inc., 336 N.W.2d 408 (Iowa 1983) is instructive on the plight of a trial lawyer when confronted with conflicting trial schedules. In finding that the trial court abused its discretion by denying a continuance, the Supreme Court of Iowa cited with approval the case of Coburn v. Domanosky, 257 Pa.Super.474, 480, 390 A.3d 1335, 1338 (1978). This court stated, "[T]he most important factor for granting the continuance is that counsel did offer a reasonable explanation for his scheduling conflict, specifically, that he thought that he could handle both the civil and criminal cases because the criminal case looked to be a

short one, and because the civil case was far down on the list of civil cases for that week." In Department of General Services, the trial lawyer had a scheduling conflict and had no one else to try the dismissed case in his stead. He indicated to the court that he had recently employed a young associate who was inexperienced. Likewise in the case at bar, Paul O'Malley has indicated at several points in the record, and the plaintiff herself in her affidavit, have stated repeatedly that he was hired because of his professional malpractice expertise and was the sole litigator on behalf of the plaintiff in this case. App. 40-41, 119-124, 134, 221-225. In Department of General Services, the party whose case was dismissed had previously consented to the trial date believing that the case in conflict would be tried one week earlier., This is a situation right on point with the case at bar. As Mr.

O'Malley has stated at various points in the record, he believed the Van Hootegem trial which was scheduled to start April 14th would take no more than two weeks, but that rulings by the Van Hootegem court in early April expanded issues and discovery in the case which required Mr. O'Malley's total preoccupation the last ten days prior to the initiation of that trial and extended the length of that trial by one week. App. 119-124, 215-218. Of course, continuances should not be encouraged and orders of the court should not be ignored. However, in a case such as this, plaintiff's counsel did everything possible to prepare the Krugman matter and litigate another medical malpractice case at the same time. Plaintiff's counsel did everything possible to apprise the trial court of these conflicts.

The case of R.E. Morris Investments, Inc., et al. v. Lind, 304 N.W.2d 189 (Iowa 1981), the trial court struck the jury trial demand as a sanction for failure to comply with a discovery order. In discussing the abuse of discretion by the trial court, the Supreme Court stated that Rule 134 of the Iowa Rules of Civil Procedure is closely patterned after Federal Rule of Civil Procedure 37. Id. at 191. Further, in discussing the meaning of the ultimate use of sanctions the court stated, "It is clear that the use of sanctions pursuant to Rule 37 is limited by the due process clause of the 5th Amendment." Id. "The right of trial by jury shall remain inviolate." Id. Therefore, this court concluded that a party may not be divested of that fundamental right for failure to comply with a discovery order. Likewise, in the case at bar, the Krugman case should not have been dismissed as a sanction. The harsh

sanction of dismissal is disproportionate to the plaintiff's failure to comply with the discovery orders. Plaintiff did everything humanly possible to comply, but could only be in one court room at a time for the trial of a malpractice case when there is an inability to comply with discovery orders, the sanction of dismissal should not be imposed. State ex Rel. Parcel v. St. John, 308 N.W.2d 8 Iowa 1981). Based upon the propositions cited herein and the clear abuse demonstrated by the trial court, this court should unhesitatingly reverse the rulings of the trial court and resurrect this matter for trial.

CONCLUSION

The trial court, both Judge Briles and Judge de Silva, abused their discretion in applying sanctions, failing to continue the case, and failing to vacate its earlier orders. A manifest injustice has occurred to plaintiff, Bonnie Krugman and the equi-

ties involved herein strongly favor her right to a jury trial. The plaintiff has not been willful, at fault, or in bad faith in any of his conduct in preparing this matter for trial. It is respectfully requested that the trial court's denial of plaintiff's motion for continuance, the order barring presentation of expert testimony, the dismissal of the case as a sanction, and the failure to vacate these prior orders can be reversed and the case be remanded for a new trial with directions to the trial court to properly prepare this case for trial.

STATEMENT OF DESIRE TO BE HEARD IN ORAL ARGUMENT

Plaintiff-appellant hereby states that she desires to be heard in oral argument upon submission of this case.

ATTORNEY'S COST CERTIFICATE

I, Paul R. O'Malley, hereby certify the actual cost of reproducing the necessary copies of the preceding Appellant's Brief consisting of 19 pages was $ and that amount has been actually paid in full by me.

/s/

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APPENDIX 5

IN THE SUPREME COURT OF IOWA

No. 86-896

BONNIE KRUGMAN,

Plaintiff-Appellant,

v.

PALMER COLLEGE OF CHIROPRACTICS, WARREN RHODES, D.C., and PATRICK T. KEEFE, D.C.,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HON. MARGARET S. BRILES and
HON. EDWARD B. DeSILVA, Jr., Judges

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF FILING

I, Paul R. O'Malley, hereby certify that I will file the attached Appellant's Reply Brief by mailing 18 copies thereof on March 27, 1987, addressed to the Clerk of the Supreme Court, Statehouse, Des Moines, Iowa 50319

/s/
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CERTIFICATE OF SERVICE

I, Paul R. O'Malley, hereby certify that on March 28, 1987 I served the attached Appellant's Reply Brief by mailing two copies thereof to Robert D. Lambert, attorney for defendants-appellees.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. KRUGMAN'S NOTICE OF APPEAL WAS TIMELY TO CONFER JURISDICTION.

Cases and Authorities

In the Matter of the Estate of Dull,
303 N.W.2d 402, 404 (Iowa, 1981);

Kagin's Numismatic Auctions, Inc. v Criswell,
284 N.W.2d 224, 226 (Iowa, 1979);

Peoples Trust & Savings Bank v. Baird
346 N.W.2d 189 (Iowa, 1984);

Suckow v. Boone State Bank & Trust Co.,
314 N.W.2d 421, 423-425 (Iowa, 1982);

Union Trust & Savings Bank v. Stanwood Feed and Grain, Inc.
158 N.W.2d 1,3 (Iowa, 1968).
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II. KRUGMAN' RIGHTS FOR DUE PROCESS OF LAW HAVE BEEN UNJUSTLY DEPRIVED.

Cases and Authorities

R.E. Morris Investments, Inc., et al. v. Lind
304 N.W.2d 189 (Iowa, 1981)

Smiley v. Twin City Beef Co.,
236 N.W.2d 356, 359-360 (Iowa, 1975

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U.S. Constitution, Fifth Amendment

III. IN ORDER TO JUSTIFY DISMISSAL OF THE ACTION A PARTY'S NON-COMPLIANCE MUST BE DUE TO WILLFULNESS, FAULT OR BAD FAITH.

Cases and Authorities

Fox v. Studebaker-Werthington, Inc.,
516 F.2d 989, 993 (8th Cir. 1975);

McQuillen v. City of Sioux City,
306 N.W.2d 789, 791 (Iowa, 1981);

Smiley v. Twin City Beef Co.,
236 N.W.2d 356 (Iowa, 1982).

ARGUMENT

I. KRUGMAN'S NOTICE OF APPEAL WAS TIMELY TO CONFER JURISDICTION.

The Defendants have raised the issue of lack of subject matter jurisdiction for this appeal. The plaintiff contends that the notice of appeal was timely to confer subject matter jurisdiction.

On October 27, 1986 this court ruled on defendant's Motion to Dismiss this appeal as untimely, stating that "plaintiff's motion to vacate dismissal/sanctions order was in essence a motion pursuant to Iowa Rule of Civil Procedure 179(b), and that it extended the time for filing notice of appeal." Iowa Rule of Appellate Procedure 5(a) and Suckow v. Boone State Bank & Trusts Co., 314 N.W.2d 421, 423-425 (Iowa, 1982).

It is fundamental that a notice of appeal must be filed within 30 days of the entry of the order, judgment or decree unless that time period is tolled. Iowa Rule of Appellate Procedure 5(a). A tolling

will occur if certain post-trial motions are filed as provided in Iowa Rule of Civil Procedure 179(b) and 247. Then the notice of appeal must be filed within 30 days after the entry of the ruling on such motions. Iowa Rule of Appellate Procedure 5.

Moreover, the Supreme Court of Iowa has stated on several occasions that the court will look to the substance of the posttrial motion filed and not its name or title to determine if it falls within the type of motion that will toll the same period for filing a notice of appeal. Peoples Trust & Savings Bank v. Baird, 346 N.W.2d 1,2 (Iowa, 1984); In the Matter of the Estate of Dull, 303 N.W.2d 402, 404 (Iowa, 1981); Kagin's Numismatic Auctions, Inc. v. Criswell, 284s N.W.2d 224, 226 (Iowa, 1979); Union Trust and Savings Bank v. Stanwood Feed and Grain, Inc., 158 N.W.2d 1, 3 (Iowa, 1968). In all of these cases there were certain vagaries in the charac-

terization of the posttrial motion. In all of these cases the courts "in essence" ruled that the motion was a 179(b) motion for enlarged and amended findings. In the instant case plaintiff filed her motions for a new trial and/or to vacate the order of dismissal within 10 days of the order of dismissal on April 28, 1986. Upon denial of these motions, plaintiff filed her notice of appeal within 30 days. In Peoples Trusts & Savings Bank v. Baird, the bank filed a "motion for rehearing" within the time permitted for posttrial motions. In Kagin Numismatic Auction, Inc. v. Criswell, Kagin filed a "motion to reconsider" which was construed to be a Rule 179 motion. In the matter of Estate of Dull, a "motion for new trial" was filed for posttrial relief. In all of these cases, the Supreme Court of Iowa looked to the substance of the motion and not to its name to see if it was actually a motion within Rule 179(b).

In all cases, as in the instant case, the posttrial motions were construed to fall within the ambit of Rule 179(b). Likewise, in the instant case, the matter was called to trial without a jury having been picked. The case was clearly on trial. As the trial court stated in its own language, "this matter is coming on for hearing this morning on trial on the merits of this case, it having been previously set for trial in the State." (App. 186). Clearly, plaintiff's posttrial motion filed within 10 days of an adverse ruling at trial and then a notice of appeal filed within 30 days of the denial of the motion, confers subject matter jurisdiction on this court.

II. KRUGMAN'S RIGHTS FOR DUE PROCESS OF LAW HAVE BEEN UNJUSTLY DEPRIVED.

When the ultimate sanction of dismissing a case at trial is entered by the court, the plaintiff/litigant's rights are barred from further trial by jury. The right of

trial by jury is fundamental and clothed in constitutional protections. U.S. Constitution, Fifth Amendment. R.E. Morris Investments,Inc., et al v. Lind, 304 N.W.2d 189 (Iowa, 1981).

The ultimate sanction of the dismissal of the cause of action should not be used to punish the litigant especially in a situation which has been carefully described by plaintiff's counsel wherein he attempted to do everything possible to prepare the Krugman case and litigate another medical malpractice case, also called for trial at the same time. Iowa Rule of Civil Procedure 134, the sanctions provision, is closely patterned after Federal Rule of Civil Procedure 37. Smiley v. Twin City Beef Co., 236 N.W.2d 356, 359-360 (Iowa, 1975). In interpreting FRCP 37 the United States Court said:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived

> of property without due process of law, and more particularly against the opinions of this court in Hovey v. Elliot, 167 U.S. 409, and Hammond Packing Co. v. Arkansas, 212 U.S. 197, 209 (1957).

The necessity, imposition and severity of such sanctions that are entered by the trial court must be weighed against one's fundamental right for due process of law. In the instant action, Krugman's day in court has been unnecessarily and unfairly taken away from her.

III. IN ORDER TO JUSTIFY DISMISSAL OF THE ACTION A PARTY'S NON-COMPLIANCE MUST BE DUE TO WILFULNESS, FAULT OR BAD FAITH.

Case law in Iowa is legion on the necessary finding by the trial court to justify dismissal of the action. The trial court must find that a party's noncompliance must be due to willfulness, fault, or bad faith. Fox v. Studebaker-Werthington, Inc., 516 F.2d 989, 993 (8th Cir. 1975); McQuillen v. City of Sioux, 306 N.W.2d 789, 791 (Iowa, 1981); Smiley, 236 N.W.2d 360; Suckow v.

Boone State Bank and Trust Co., 314 N.W.2d 421, 425 (Iowa, 1982). The jist of the abuse of discretion in imposing sanctions in the instant case lies in the trial court's confusion and misperception with willfulness, fault, bad faith and gross neglect with inability, preoccupation, competing trials, and extenuating circumstances. At no time did plaintiff's counsel act with gross neglect, willfulness or any deliberate or intentional desire to thwart or refuse to cooperate with discovery orders and procedural matters. On the contrary, plaintiff's counsel has already demonstrated that he had an expert who indicated that plaintiff had a meritorious case (App. 133) and further disclosed the names of three experts. These facts on itself indicate that plaintiff has a meritorious claim and that a trial on its merits should be promoted rather than a case dismissed for defaults on discovery

orders and other procedural matters. What appeared to be willfulness, bad faith, or neglect by the trial court was in actuality plaintiff's counsel competing obligation with a simultaneous medical malpractice trial also sets in April of 1986 in Rock Island County, State of Illinois. App. 33-34, 40-43, 101, 119-124, 213-221. What appeared to the trial court to be willfulness, bad faith or neglect was instead the extenuating circumstance of a dual and competing medical malpractice trial. App. 215-226. Mr. O'Malley stated at various points in the record that the Illinois trial which was scheduled to start April 15d, he believed, would take no more than 2 weeks. App. 215-226. However, rulings by the court in that case expanded the issues, expanded the need for further discovery and evidentiary depositions which totally preoccupied Mr. O'Malley's time in the 10 days prior to the initiation of

the Illinois trial. App. 119-124, 215-218. The findings by the trial court, both Judge Briles and Judge de Silva, that plaintiff's counsel had acted with fault, willfulness and neglect amounted to an abuse of discretion which deprived the plaintiff of her right to a jury trial. This abuse of discretion plaintiff contends is the error which demands reversal of the orders appealed from. It was this abuse of discretion which was unreasonable under the attendant circumstances. (App. 215-226). The term "abuse of discretion" refers to "an erroneous conclusion in judgment, one clearly against logic and effect of facts and circumstances before the court, or the reasonable probable, and actual deductions to be drawn therefrom." State v. Morrison, 323 N.W. 2d 254, 256(Iowa, 1982). It is these erroneous conclusions and judgments which plaintiff appeals from and appeals to this court for reversal.

CONCLUSION

WHEREFORE, the plaintiff/appellant, BONNIE KRUGMAN, respectfully prays that this court reverse the orders of the trial court entered on April 9, 1986 denying plaintiff's motion to continue the final pre-trial conference and remove the case from its trial setting and continue the trial; the April 21, 1986 order denying plaintiff's motion to reconsider the application to continue the trial date; the order of April 28, 1986 entering sanctions against the plaintiff by precluding her from expert testimony and dismissing her petition; and the order entered on May 27, 1986 denying plaintiff's motions to vacate the dismissal order and order of sanctions, and remand this cause for trial.

STATEMENT OF DESIRE TO BE HEARD IN ORAL ARGUMENT

Plaintiff-appellant hereby states that she desires to be heard in oral argument upon submission of this case.

ATTORNEY'S COST CERTIFICATE

I, Paul R. O'Malley, hereby certify the actual cost of reproducing the necessary copies of the preceding Appellant's Brief consisting of 8 pages was $43.78 and that amount has been actually paid in full by me.

/s/

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APPENDIX 6

IN THE SUPREME COURT OF IOWA

NO. 86-896

BONNIE KRUGMAN,

Plaintiff/Appellant

v.

PALMER COLLEGE OF CHIROPRACTIC
WARREN RHODES, D.C., and
PATRICK T. KEEFE, D.C.

Defendants-Appellees

APPEAL FROM THE DISTRICT COURT
OF SCOTT COUNTY
Honorable Margaret S. Briles
and Honorable Edward B.
de Silva Jr., Judges

PLAINTIFF-APPELLANT'S RESPONSE TO
APPLICATION FOR FURTHER REVIEW

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Attorney for
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Bonnie Krugman

CERTIFICATE OF FILING

I certify that on December 29, 1987, I filed this Response to Application for Further Review by mailing 18 copies to the Clerk of the Supreme Court, State House, Des Moines, Illinois 50319

/s/
Paul R. O'Malley

CERTIFICATE OF SERVICE

I certify that on December 29, 1987, I served this Response to Application for Further Review by mailing 2 copies to Defendants-Appellees' counsels of record:

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Carlin Hellstrom & Bittner
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/s/
Paul R. O'Malley

ARGUMENT AND CASE AUTHORITY

I. THE DECISION OF THE IOWA COURT OF APPEALS DOES NOT CONTRAMAND THE IOWA RULES OF CIVIL PROCEDURE OR ORDERS OF THE IOWA SUPREME COURT.

II. THE DECISION OF THE IOWA COURT OF APPEALS IS NOT IN CONFLICT WITH PRECEDENTIAL IOWA COURT OF DECISIONS.

Department of General Services v. R.M. Boggs Company, Inc. 336 N.W.2d 408 (Iowa 1983)

Sullivan v. Chicago and Northwestern Trans., 326 N.E.2d 320, 324 (Iowa 1982)

Suckow v. Boone State Bank and Trust Co., 314 N.W.2d 421, 425 (Iowa 1982)

Smiley v. Twin City Beef Co., 236 N.E.2d 356, 360 (Iowa, 1975)

Fox v. Worthington, Inc., 516 F.2d 989, 993 (8th Cir., 1975)

McQuillen v. City of Sioux City, 306 N.W. 2d 789, 791 (Iowa, 1981)

State v. Jartin, 271 N.W.2d 902, 911 (Iowa, 1976)

III. ISSUES RAISED FOR WHICH DEFENDANTS-APPELLEES REQUEST ADVICE OR CLARIFICATION WITH RESPECT TO AN APPELLATE COURT DECISION ARE NOT PROPER MATTERS BEFORE THE IOWA SUPREME COURT.

IV. DEFENDANTS-APPELLEES APPLICATION FOR FURTHER REVIEW FAILS TO RAISE ANY MATTERS FOR WHICH THE IOWA SUPREME COURT NEED EXAMINE FURTHER.

RESPONSE TO APPLICATION FOR FURTHER REVIEW

Comes now Plaintiff-Appellant, Bonnie Krugman, pursuant to applicable rules of Iowa Civil Appeals, and hereby requests that the Iowa Supreme Court deny Defendants-Appellees Application for Further Review of the Iowa Court of Appeals decision filed November 30, 1987. In support of the request of denial of the application for further review, Plaintiff-Appellant states as follows:

STATEMENT OF RESPONSE

The invective used by Defendants-Appellees in an attempt to over-dramatize their Application for Further Review should stand for nothing more than rhetoric. This same unwarranted attack upon plaintiff's counsel was rejected by the Iowa Court of Appeals in an unequivocal opinion. The Court of Appeals examined the relevant record and decided this appeal with due deliberation after the issues were fully

briefed and arguments heard. In short, the opinion of the Iowa Court of Appeals reflects a well reasoned decision finding a clear abuse of discretion in the imposition of sanctions with reinstatement of an Iowa citizen's right to a trial on the merits.

ARGUMENT

I. THE DECISION OF THE IOWA COURT OF APPEALS DOES NOT CONTRAMAND THE IOWA RULES OF CIVIL PROCEDURE OR ORDERS OF THE IOWA SUPREME COURT

The order of the Iowa Supreme Court setting an 18 month time standard for disposition of civil jury cases was neither an issue nor applicable to this case on appeal. The case was sent for trial at the trial setting conference on October 22, 1985 by agreement when it was not apparent to anyone that another trial might extend beyond the April 28, 1986 trial setting. Simply stated, the issue decided by the Iowa Court of Appeals was whether the harshness of barring plaintiff's expert

testimony and ordering dismissal of the action was an abuse of discretion in light of the obvious impossibility of compliance with a pretrial and trial schedule in another state.

Further, the opinion of the Iowa Court of Appeals does not attempt to impugn, confine or limit any of the discovery or sanction provisions of Iowa Rules of Civil Procedure. The Appellate Court merely evaluated whether or not the discretionary powers contained within sanction rules were abused based upon previous Iowa decisions and fundamental fairness with due respect to the rights of all parties.

II. THE DECISION OF THE IOWA COURT OF APPEALS IS NOT IN CONFLICT WITH PRECEDENTIAL IOWA COURT DECISIONS.

In finding that the sanctions imposed were the result of abuse of discretion, the Appellate Court opinion obtained its guidance from Iowa precedent. Department of General Services v. R.M. Boggs Company,

Inc., 336 N.W.2d 408 (Iowa 1983). The Appellate Court found the trial courts' decisions to be "clearly untenable and unreasonable" resulting in severe prejudice by the barring of plaintiff's expert testimony and ordering dismissal of her action. The Iowa Court of Appeals decision and reasoning is wholly consistent with Iowa Court decisions which set forth the appropriate test to be applied in determining whether a sanction selected by a trial court is the result of abuse of discretion, Sullivan v. Chicago and Northwestern Trans., 326 N.E.2d 320, 324 (Iowa 1982); Suckow v. Boone State Bank and Trust Co., 314 N.W.2d 421, 425 (Iowa 1982); Smiley v. Twin City Beef Co., 236 N.E.2d 356. 36(Iowa, 1975); Fox v. Worthington, Inc., 516 F.2d 989, 993 (8th Cir., 1975); McQuillen v. City of Sioux City, 306 N.W.2d 789, 791 (Iowa, 1981) as well as the test for abuse of discretion set forth in the case of State

v. Jartin, 271 N.W.2d 902, 911 (Iowa, 1976), cited by Defendants-Appellees in their Application for Further Review.

III. ISSUES RAISED FOR WHICH DEFENDANTS-APPELLEES REQUEST ADVISE OR CLARIFICATION WITH RESPECT TO AN APPELLATE COURT DECISION ARE NOT PROPER MATTERS BEFORE THE IOWA SUPREME COURT.

It is fundamental that the Iowa Supreme Court has the right to direct that the Appellate Court decide certain cases, despite the fact that a litigant has appealed to the Supreme Court for relief. This power and right is properly exercised when the Supreme Court refers a case involving issues of abuse of discretion of the trial court on matters in which Iowa law has previously enunciated clear standards.

When an Appellate Court decision is clear and unambiguous in applying standards enunciated is highly regarded precedent there is no right nor necessity to request that the Iowa Supreme Court be further burdened with having to provide advice or

clarification of well reasoned opinions of the Appellate Court. To allow such review would invite a veritable onslaught of appeals under the guise of application for "advisory opinions."

IV. DEFENDANTS-APPELLEES APPLICATION FOR FURTHER REVIEW FAILS TO RAISE ANY MATTERS FOR WHICH THE IOWA SUPREME COURT NEED EXAMINE FURTHER.

The opinion of the Court of Appeals is neither in conflict with the mandates of the Iowa Supreme Court or with any Iowa Appellate or Supreme Court decisions. Neither the right or remedy of appropriate Appellate decision. Merely the harshness of sanctions in light of the attendant circumstances of this case were at issue. The opinion finding an abuse of discretion applies to the unique facts of this case and is amply supported by Iowa case law. (citations, supra).

It is equally clear that the Appellate Court's decision is not based on nor did it require a finding of constitutional viol-

ation. Yet the Court saw fit to provide additional support for its decision by addressing those constitutional rights which are so fundamental in balancing the rights of the parties. The plaintiff's right to a trial on the merits was the central theme of the plaintiff's two motions for continuance of the trial, plaintiff's motion to vacate the dismissal and sanctions as well as plaintiff's appeal. The fact that a right to a trial on the merits is founded in constitutional precepts is so fundamental as to not require extensive arguments and briefing on due process of law. Clearly, there is no issue here for further review.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant requests that this court deny Defendants-Appellees' Application for Further Review and enter or direct that

a mandate be entered for remand of this case to the trial court.

Respectfully submitted,

/s/
Paul R. O'Malley

Attorney for
Plaintiff-Appellant,
Bonnie Krugman

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Rock Island, Illinois 61201

ATTORNEY'S COST CERTIFICATION

We hereby certify that the costs paid for printing the foregoing Response to Application for Further Review was the sum of $52.00.

/s/
Paul R. O'Malley

APPENDIX 7

IN THE SUPREME COURT OF IOWA

NO. 86-896

BONNIE KRUGMAN,

Plaintiff-Appellant,

vs.

PALMER COLLEGE OF CHIROPRACTIC,
WARREN RHODES, D.C., and
PATRICK T. KEEFE, D.C.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SCOTT COUNTY
Honorable Margaret S. Briles and
Honorable Edward B. deSilva, Jr., Judges

PLAINTIFF'S-APPELLANT'S PETITION
FOR REHEARING IN THE SUPREME COURT

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Attorney for Plaintiff-Appellant

CERTIFICATE OF FILING

I certify that on the 3rd day of May, 1988, I filed this Plaintiff's-Appellant's Petition for Rehearing in the Supreme Court by mailing Federal Express an original and 17 copies to the Clerk of the Supreme Court of Iowa, State Capitol Building, Statehouse, Des Moines, Iowa 50319.

/s/Paul R. O'Malley

CERTIFICATE OF FILING

I certify that on the 3rd day of May, 1988, I served this Plaintiff's-Appellant's Petition for Rehearing in the Supreme Court on Defendants-Appellees, Palmer College of Chiropractic, Warren Rhodes, D.C. and Patrick T. Keefe, D.C., by mailing Federal Express two copies of it to their counsel of record: Mr. John J. Carlin and Robert D. Lambert, Carlin, Hellstrom & Bittner, 1000 First Bank Center, Davenport, Iowa 52801.

/s/ Paul R. O'Malley

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THIS COURT HAS FAILED TO ADDRESS THE MOST SALIENT ISSUE ON APPEAL.

II. PLAINTIFF'S INABILITY TO COMPLY WITH COURT ORDERS ENTERED ON APRIL 9, 1986 AND APRIL 21, 1986 WAS NOT WILFUL.

III. PLAINTIFF SHOULD NOT BE CHARGED WITH WILFUL NON-COMPLIANCE WITH A COURT ORDER, LATER MODIFIED.

IV. THIS COURT'S OPINION IS IN CONFLICT WITH DEPT. OF GENERAL SERVICES V. BOGGS, ET AL.

V. THIS COURT HAS FAILED TO WEIGH THE APPROPRIATENESS OF DISMISSAL AS A SANCTION IN LIGHT OF CONSTITUTIONAL DUE PROCESS RIGHTS.

PETITION FOR REHEARING

COMES NOW, the Plaintiff-Appellants, pursuant to Rule 27 of Iowa Rules of Appellate Procedure and hereby petitions the Iowa Supreme Court for Rehearing of its decision entered on April 13, 1988 in which this Court has: (1) overlooked and misapprehended the facts on appeal; (2) overlooked and misapplied the applicable law pertaining to the issues of appeal; (3) failed to address the real issue raised on appeal.

I. THIS COURT HAS FAILED TO ADDRESS THE MOST SALIENT ISSUE ON APPEAL.

This Court chose to decide only one issue on appeal, whether the Trial Court's dismissal was an abuse of discretion. This Court further stated that the other issues raised on this appeal and specifically addressed by the Court of Appeals, including whether the denial of two petitions for continuance were abuses of discretion, were unnecessary.

Yet, it is indisputably clear that had any one of the two petitions for continuance been granted, neither the sanction of dismissal nor the sanctions as to plaintiff's experts would have occurred.

The real and fundamental issue in this Appeal was whether the denial of the two petitions for the plaintiff's first request for continuance of settlement conference and trial was an abuse of discretion in light of the inability of plaintiff's counsel to complete and file settlement docu-

ments and be on trial in two courts simultaneously. The failure of this Court to address the "real" issue in this case contradicts both its concern and it previous decision in Dept. of General Services v. Boggs, et al., 336 N.W.2d 408 (Iowa 1983), where this Court chose to address the same issue which it now finds unnecessary. In fact, in the Boggs case, this Court felt that the question of a right of continuance when an attorney is confronted with simultaneous trials was significant enough to address the issue despite the fact that in real terms the issue on appeal had become moot [cause settled and dismissed before opinion issued]. In the case at bar, the same issue, could never be more real since the fate of the plaintiff hinges entirely on the expectation that this Court would find the issue no less real than it did in Dept. of General Services v. Boggs, et al., supra.

The inability of the plaintiff's counsel to be able to file final settlement conference documents and attend trial, was clearly due to his engagement in another trial. The ultimate dismissal was a direct consequence of the denial of the plaintiff's two petitions for continuance. As stated in the record without refutation, it became impossible for plaintiff's counsel to extricate himself from the extended commitment of another trial to comply with Court orders entered after plaintiff's petitions for continuance were denied. The failure of this Court to address this real issue constitutes a failure of this Court to address the essence of this Appeal.

II. PLAINTIFF'S INABILITY TO COMPLY WITH COURT ORDERS ENTERED ON APRIL 9 1986 AND APRIL 21, 1986 WAS NOT WILFUL.

Again, this issue does not arise but for the fact that plaintiff's two petitions for continuance were denied. In point of fact, plaintiff had been in compliance with

all Court orders at issue until the first petition for continuance filed on April 8, 1986 was heard and denied on April 9, 1986.

This Court addressed three instances of noncompliance of Court orders which had deemed wilful, to wit:

> "Plaintiff violated (1) the January 28 order by failing to complete discovery; (2) the April 1 order by filing her supplementation to defendants' interrogatory number seven late, and by failing to make her experts available for discovery as ordered; and (3) the April 9 order by failing to file the settlement conference documents required under district court rule 7.1B. Attorney O'Malley was aware of these orders and willfully did not comply with them in the hope, it appears, that a motion for continuance would solve his difficulties." (Supreme Court Opinions dated 4/13/88, pg. 11).

However, the record in this case reflects that plaintiff's disclosed the identity of his experts on February 28th as ordered and supplemented his answers to interrogatories on April 7, 1986, as additionally ordered. No wilfulness can be assigned to the fact that when plaintiff

was ordered to supplement interrogatories by April 4, 1986, plaintiff filed answers dated April 4, 1986, although not file--stamped until April 7, 1986, one working day late (April 5 - April 6 included week-end). (See Court of Appeals Opinion).

No wilfulness should be assigned when plaintiff's counsel was unable to comply with the Court order of April 9, 1986, requiring the filing of settlement conference documents by April 21, 1986 (Trial Court (Judge Briles) had cancelled the settlement conference of April 9, 1986, and plaintiff's counsel commenced trial in Illinois on April 14, 1986, after taking experts' depositions in Madison, Wisconsin on April 7, 1986, preparing and attending a pretrial conference in Rock Island, Illinois on April 9, 1986 and taking a further expert deposition in Chicago, Illinois on April 11, 1986, all in preparation for the Illinois trial that commenced on April 14, 1986).

III. PLAINTIFF SHOULD NOT BE CHARGED WITH WILFUL NONCOMPLIANCE WITH A COURT ORDER, LATER MODIFIED.

Wilfulness should never be equated with inability to comply with a Court order (Judge Briles' order of April 21, 1986). The Trial Court (Judge Briles) was advised at the hearing on plaintiff's motion to reconsider petition for continuance, that counsel would be unable to comply with the previous scheduling of a pretrial conference or complete discovery depositions prior to trial. Obviously Judge Briles' recognized that inability by modifying her previous order, cancelling the settlement conference and granting additional time to complete plaintiff's experts' depositions to the time of trial. Plaintiff's counsel was entitled to rely on the Court's modified order and should not be charged with wilfulness in not complying with a Court order that is later modified.

This Court failed to address the fact that Judge Briles entered an order on April 21, 1986 (Hearing on April 16, 1988 on motion filed on April 10, 1986) extending the time for discovery depositions of plaintiffs experts to the time of trial. No wilfulness should be assigned to plaintiff's counsel when the Court orders that plaintiff experts need not be produced until trial. (See the Court of Appeals decision, page).

IV. THIS COURT'S OPINION IS IN CONFLICT WITH DEPT. OF GENERAL SERVICES V. BOGGS, ET AL.

No meaningful distinction exist between the pertinent facts and issues in Boggs and the case at bar. The only distinctions in the case at bar are that the conflict in trial settings occurred between an Illinois District Court and an Iowa District Court and the attorney placed in conflict is an Illinois resident with his primary law offices in Illinois rather than

Iowa. In Boggs, the conflict of overlapping trials occur within a "unified court system" involving only Iowa resident counsel. Clearly these distinctions are illusory when measured against the rights of an Iowa citizen to a trial on the merits with adequate representation by counsel.

Every trial date commitment must be made based on the presumption that no conflict will then exist. Yet no trial attorney has the omniscient power to avoid or prevent all potential conflicts or know with certainty that his multitude of commitments to various courts in various jurisdictions might one day find him in an impossible dilemma.

As stated by this Court in the Dept. of General Services v. Boggs, supra, citing Coburn v. Domansky, 257 Pa. Super. 474, 480, 390 A.2d 1335, 1338 (1978):

> "("[T]he most important factor [for granting the continuance is that] counsel did offer a reasonable explanation for his scheduling conflict, specifi-

cally that he thought that he could handle both the civil and the criminal cases, because the criminal case looked to be a short one, and because the civil case was far down on the list [of civil cases for that week].").

This Court further stated in Boggs:

"In the present case, Boggs consented to the November 8 trial date believing that a case involving its attorney which was scheduled to be tried one week earlier would be settled or, if not settled, could be tried within one week. As soon as it became apparent that he was mistaken, counsel filed a motion for a continuance pursuant to Iowa R.Civ.P. 181.3(b):

> When a case assigned for trial is reached and an attorney of record therein is then actually engaged in a trial in another court, it shall be his duty to so inform the court who may hold the trial of such case in abeyance until the engagement is concluded. As soon as the attorney is free from such engagement it shall be his duty to notify the court immediately and stand ready to proceed with trial of the case."

(336 N.W.2d, 408, 410 (1983). (Emphasis added).

In the case at bar, the record reflects that plaintiff's counsel agreed to a scheduling of another trial two weeks prior to the trial commitment in this case, believing

that, if a trial was necessary, it would last less than two weeks and not conflict with the trial commitment herein. As stated in the Appellate Court opinion after thorough review of the record, pg. 7:

> "In the present case (1) Attorney O'Malley indicated 20 days before trial that he desired a continuance due to the fact the conflicting case he was to try in another state would take three weeks, rather than his estimated two weeks, which would cause overlapping of the two cases; (2) Attorney O'Malley was the sole litigator in this matter, although local counsel was of record, and was hired by Krugman because of his professional malpractice expertise; (3) Attorney O'Malley was committed to the court in the conflicting case (a medical malpractice drug reaction trial), which was of just as significant a posture as the Krugman case wherein O'Malley's expertise was required;"

The Court of Appeals, in finding that "good cause" was demonstrated to continue the trial of this case, stated further, pg. 8:

> "We are in good disagreement with Judge Briles's ruling that "good cause" was not demonstrated to continue the case. This was Krugman's first and only request for a continuance; there is no doubt Attorney O'Malley's

> presence was imperatively required in two places at one time; that he advised the court of his earliest one time; that he advised the court at his earliest knowledge, 20 days before trial, of the need for a continuance; that Attorney O'Malley was chosen in each of the two conflicting trials because of his expertise; that due to his required presence in the conflicting trials, it was not possible for him to meet the discovery requests;"

Surely it was not erroneous for the Appellate Court to rely on this Court's opinion in Dept. of General Services v. Boggs, et al. where this Court stated:

> "We look to the case of Dept. of General Services, 336 N.W.2d at 408, for our guidance. That case is factually similar to the case at bar. In Dept. of General Services, the trial attorney was scheduled for two overlapping trials in the same courthouse. The trial counsel had no one else, other than an inexperienced young associate, to try the case. Counsel had previously consented to the trial date, believing the trial in conflict would be settled or completed the prior week. Ten days before trial, counsel realized the conflicting case would not be settled and, in addition, would take three weeks rather than the estimated one week. Trial court denied the motion for continuance. Interlocutory appeal was taken, proceedings were stayed, and the case settled. However, the supreme court considered

> the appeal as not being moot in order to provide authoritative adjudication for future guidance in cases involving similar issues." (Emphasis added).

V. THIS COURT HAS FAILED TO WEIGH THE APPROPRIATENESS OF DISMISSAL AS A SANCTION IN LIGHT OF CONSTITUTIONAL DUE PROCESS RIGHTS.

Dismissal of an action due to the inability of a party or a party's counsel to fully comply with Court Order (file settlement conference documents and attend trial) is a violation of a citizen's constitutional due process rights guaranteed by both the Iowa and U.S. Constitutions. As stated in R.E. Morris Investments, Inc. et al. v. Lind, 304 N.W.2d 189, 191 (Iowa, 1981) where the propriety of sanctions under Rule 134 was discussed, in light of constitutional limitations, the Court stated:

> "Initially, we note that the federal courts have recognized constitutional limitations on the imposition of sanctions pursuant to Fed.R.Civ.P. 37. See *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v Rogers, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255, 1265 (1958); Hammond Packing

> Co. v. Arkansas, 212 U.S.322, 350-51, 29 S.Ct. 370, 380, 53 L.Ed. 530, 544-45 (1909); Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed 215 (1897). See generally 8 C. Wright & A. Miller, Federal Practice and Procedure §2283 (1970). Rule 134 is closely patterned after Fed.R. Civ.P. 37, see Smiley v. Twin City Beef Co., 236 N.W.2d 356, 359-60 (Iowa 1975), and decisions in the federal courts interpreting that rule are of persuasive authority." (304 N.W.2d 189, 191).

The Supreme Court of the United States in Societe Inernationale, Etc. v. Rogers, supra, in emphasizing the limitations of Fed.R.Civ.P. 37, focused on the propriety of a dismissal sanction under circumstances where the recalcitrant party demonstrated an inability to comply with orders when it stated:

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this court in Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, and Hammond Packing Co. v. State of Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530. These decisions establish that there are constitutional limitations upon the

> power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on rules, Rule 37, 28 U.S.C. (1952 ed.) p. 4325, 23 U.S.C.A." (357 U.S. 208, 209) (Emphasis added).

The clash between sanction rules (Fed.R.Civ.P. 37) and Fifth Amendment due process guarantees has imposed similar limitations in other jurisdictions, In Emerick v. Fenick Industries, 539 F.2d 1879, 1381 (5th Cir. 1976), the court stated:

> "The discretion of the district court to order sanctions under Rule 37(b)(2) is broad but not unlimited. The due process clause of the fifth amendment limits the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. Societe Internationale v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). When the disobedient party is a plaintiff, dismissal with prejudice is a sanction of last resort, applicable only in extreme circumstances. Thomas v. United States, 531 F.2d 746, 749 (5th Cir. 1976); Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118 (5th Cir. 1967). When the disobedient party shows that his recalcitrance was based on factors beyond his control or on the exercise of constitutional privilege, a reviewing

> court is justified in terming the dismissal an abuse of discretion. See Thomas v. United States, supra; Dorsey v. Academy Moving & Storage, 423 F.2d 858, 861 (5th Cir. 1970)." (538 F.2d 1381) (Emphasis added).

The issue that the Trial Court's dismissal was a denial of plaintiff's due process right to trial was properly raised in the plaintiff's post-trial motion (App. 123, 225), plaintiff's Appellate briefs and cited in the Court of Appeals Decision. As stated by the Court of Appeals, pg. 9:

> "The issue we are presented with in the present case involves exalting form over substance. Krugman's rights are damaged by dismissal of her case and denial of expert testimony. The harsh sanctions of dismissal we find to disproportionate to Attorney O'Malley's failure to comply with the discovery orders. less drastic alternatives were available. Krugman should not be punished when her counsel could not be at two trials at one time and asked for his first continuance of the case 20 days before trial was to commence and also moved for a continuance on discovery when he realized he could not complete the deadlines. Local counsel did not have the expertise to try the case. The chart set out earlier in this opinion demonstrates the intertwining events of Attorney O'Malley's commitments to both trials. The severity of dismissal

> and the reasons for it need to be weighed against Krugman's right of due process of law. The attendant circumstances in this case weigh in favor of Krugman to proceed with her right to a trial on the merits of this case. We find Attorney O'Malley has not been willful, at fault, or acted in bad faith in his conduct with regard to discovery orders and procedural matters. We find he listed his experts on February 28, 1986, in compliance with the January 28, 1986, court order. Krugman was ordered to supplement interrogatories by April 4, 1986; the supplement was mailed on April 4, 1986 and on file April 7, 1986. He alerted the court at his earliest opportunity to the extenuating circumstances of the situation he was in." (Emphasis added).

CONCLUSION

For the foregoing reasons, plaintiff-appellant petitions this court for Rehearing and request that this Court vacate its decision entered on April 13, 1988 and affirm the decision of the Court of Appeals entered on November 30, 1987.

PAUL R. O'MALLEY, LTD.

BY: _____
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ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost paid for printing the foregoing Plaintiff's-Appellant's Petition for Rehearing in the Supreme Court was the sum of $65.00 by Paul R. O'Malley, Ltd.

/s/ Paul R. o'Malley

PRINTER'S COST CERTIFICATE

I hereby certify that the true and actual cost of reproducing the foregoing Plaintiff's-Appellant's Petition for Rehearing in the Supreme Court was the sum of $65.00.

/s/ Paul R. O'Malley

APPENDIX 8

IN THE SUPREME COURT OF IOWA

O R D E R

BONNIE KRUGMAN,	)	**F I L E D**
		Jun 15 1988
Appellant,	)	Clerk of the Supreme Court
v.	)	No. 86-896
PALMER COLLEGE OF CHIROPRACTIC, WARREN RHODES, D.C., and PATRICK T. KEEFE, D.C.,	)	
	)	
Appellees.		

After consideration by the court, en banc, appellant's Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Done this 15th day of June, 1988.

The Supreme Court of Iowa

/s/
Arthur A. McGiverin
Chief Justice

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Supreme Court, U.S.
FILED
NOV 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-634

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

BONNIE KRUGMAN,

Petitioner,

vs.

PALMER COLLEGE OF CHIROPRACTIC,
WARREN RHODES, D.C., and
PATRICK T. KEEFE, D.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF IOWA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. Bonnie Krugman v. Palmer College of Chiropractic, Warren Rhodes, and Patrick T. Keefe, Iowa District Court Law No. 66572, filed April 28, 1986.

2. Bonnie Krugman v. Palmer College of Chiropractic, Warren Rhodes and Patrick T. Keefe, Iowa District Court Law No. 66572, filed May 27, 1986.

3. Bonnie Krugman v. Palmer College of Chiropractic, Warren Rhodes and Patrick T. Keefe, No. 86-896, slip op. (Court of Appeals of Iowa, November 30, 1987).

4. Bonnie Krugman v. Palmer College of Chiropractic, Warren Rhodes and Patrick T. Keefe, 422 NW2d 470 (Iowa 1988).

RULE INVOLVED

Iowa Rule of Civil Procedure (134(b)(2)(C) quoted in pertinent part in Petition for Writ of Certiorari, p. 4.

STATEMENT OF THE CASE

COURSE OF THE PROCEEDINGS -- For the sake of brevity as required by Supreme Court Rule 22.2 and accuracy, Respondents adopt as if fully set forth herein the facts as found by the State District Court and Iowa Supreme Court as set forth on App. pages 23-42 and 168-177. Alternatively, see also Krugman v. Palmer College of Chiropractic, 442 NW2d 470 (Iowa 1988).

CONSTITUTIONAL CLAIM NOT RAISED BEFORE TRIAL COURT -- The State District Court Order dismissing the action as a sanction, and the Ruling on Motion to Vacate Dismissal Order make no mention of the Fourteenth Amendment Due Process Clause. (App. 168-177, 178-179). Krugman's counsel admitted that a decision in Krugman's favor in this abuse of discretion case "is not based on nor did it require a finding of a constitutional violation." (App. 144-145). Hence, Iowa Supreme Court opinion makes no mention of the Fourteenth Amendment Due Process Clause (App. 23-42).

REASONS FOR DENIAL OF THE WRIT

I. THE IOWA SUPREME COURT'S DECISION THAT A STATE TRIAL COURT DID NOT ABUSE ITS DISCRETION SHOULD NOT BE REVIEWED BY THIS COURT.

Supreme Court Rule 17 provides that review of a Writ of Certiorari is discretionary, and will be granted only when there are special and important reasons. That same Rule specifies the type of state court rulings which this court considers in exercising its discretion. This Iowa Supreme Court decision falls far outside of any of the considerations in Rule 17.

In abuse of discretion cases, it is not the role of the United States Supreme Court, just as it was not the role of the Iowa Supreme Court, to determine whether or not either of them would, as an original matter, have dismissed this action. The issue is whether the Scott County District Court abused its discretion in so doing. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976); (App. 36).

The Petition for Writ of Certiorari, which includes an appendix, is incomplete since it omits the April 28, 1986 District Court Order dismissing the litigation as a sanction. That Order and a subsequent Ruling denying a Motion to Vacate are attached and numbered as App. 168-179.

In the review of abuse of discretion cases, the U.S. Supreme Court has cautioned that it is a natural tendency on the part of reviewing courts, properly employing hindsight, to be heavily influenced by the severity of outright dismissal as a sanction. National Hockey League

v. Metropolitan Hockey Club, Inc., 427 U.S. at 642. But, in such cases, as in other areas of the law, the most severe of sanctions provided by statute or rule must be available to district courts in proper cases. The imposition of sanctions is not merely to penalize those whose conduct may be deemed to warrant such a sanction, but also to deter those who might be tempted to such conduct in the absence of such a deterrent. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. at 643. (App. 169).

The Petition for Writ of Certiorari rises and falls upon a faulty premise. It is argued that the district court dismissed the case "because plaintiff's counsel was unavailable due to another trial commitment." (Petition 19, 21, 23). Quite the contrary, the district court held:

> "Attorney O'Malley has argued in the Continuance Motion and the Reconsideration Motion that his unavailability due to an Illinois court trial should excuse his conduct. The Court rejects this claim. It is clear that even if Mr. O'Malley was present this case is not ready for trial."

(App. 175).

The district court summarized its factual findings in the following unambiguous language:

> "Judge Briles' findings that plaintiff never intended to be ready for trial, and plaintiff's counsel's actions have been a deliberate ploy to avoid trial have been confirmed, and unmistakably established once again on the morning set for trial. The

> totality of the record establishes willfulness, bad faith, fault and gross neglect all to the prejudice of Palmer College, Warren Rhodes and Patrick Keefe. Plaintiff and her counsel have flagrantly disregarded the rules of discovery, specific court orders, and the rules of practice and procedure of the Seventh Judicial District."

(App. 175)

The Iowa Supreme Court agreed with the district court's analysis:

> "Understandably, the trial court focused upon attorney O'Malley's conduct in failing to adequately prepare the case for trial to facilitate its disposition." (App. 38).

Iowa's highest court found that there was no abuse of discretion by the Scott County District Court. (App. 24, 37, 39 and 42). The Iowa Supreme Court painstakingly examined the record from Krugman's chiropractic care and treatment on September 3, 1980 through the trial date of April 28, 1986. (App. 24-35). Based upon that record, the Iowa Supreme Court found that Krugman's attorney "willfully did not comply with" three court orders; "the fault here lies with attorney O'Malley"; and "there is a long record of procrastination and inattentiveness on O'Malley's part in this case." (App. 39) (underlining supplied).

The Iowa Supreme Court properly performed its appellate function, and found no abuse of discretion by the District Court. Krugman now requests that this Court second guess the Iowa court on this simple abuse of discretion issue.

Krugman has availed herself of every legal remedy available in the Iowa court system. Iowa's highest court rejected her arguments. A case of this nature does not merit further review by the U. S. Supreme Court.

II. THE 14TH AMENDMENT DUE PROCESS CLAUSE DOES NOT PROVIDE A BASIS FOR THE PETITION FOR WRIT OF CERTIORARI.

All counsel agreed that this case would be tried on April 28, 1986. (App. 27, 168). The trial date arrived. The jury was present and waiting. (App. 35, 168). The Defendants Palmer College of Chiropractic, Patrick T. Keefe and Warren Rhodes were personally present, represented by their counsel, and prepared for trial. (App. 35, 168-169). Plaintiff Bonnie Krugman was not present. (App 35, 169). Plaintiff's counsel appeared but was not prepared to try to the case. (App. 35, 168-169).

The Iowa Supreme Court recreated the scene as it unfolded before the eyes of the trial judge:

> "On the date of trial, this action was over three and one-half years old, and the trial court was faced with the choice of either continuing or dismissing the case. Understandably, the trial court focused upon attorney O'Malley's conduct in failing to adequately prepare the case for trial to facilitate its disposition.
>
> We agree with the trial court that the fault here lies with attorney O'Malley."

(App. 38-39).

Krugman had her day in court. Her lawyers failed

to try the case. There was no claim at the trial court level that her due process rights had been violated. The record reveals that Attorney O'Malley in a post trial motion was simply relying upon two rules of state civil procedure, and not upon any constitutional provision. (App. 69-71; 178-179). Hence, any constitutional issue has been waived. State v. Williams, 285 NW2d 248, 269 (Iowa 1979) cert. den., 446 U.S. 921 (1980); State v. Rinehart, 283 NW2d 319, 324 (Iowa 1979), cert. den., 444 U.S. 1088 (1980).

After denial of the post trial motion, an appeal was filed and submitted to the Iowa Court of Appeals. That intermediate appellate court found an abuse of discretion. (App. 1-21).

Palmer College, Rhodes, and Keefe applied for further review to the Iowa Supreme Court. In resistance to that application, Attorney O'Malley characterized the Iowa Court of Appeals' Decision in these words:

> "The opinion finding an abuse of discretion applies to the unique facts of this case and is amply supported by Iowa case law. (Citations, supra).
>
> It is equally clear that the Appellate Court's decision is not based on nor did it require a finding of a constitutional violation."

(App. 144-145)(underlining supplied).

Since that admission by Attorney O'Malley, the Iowa Supreme Court vacated the decision of the Iowa Court of Appeals, and affirmed the district court judgment. (App. 42). Now magically arising like a phoenix from the ashes of the Iowa Supreme Court decision O'Malley argues that Krugman's due process rights were violated. (Petition

i, 4, 17, 22, 23).

The constitutional argument is nothing more than a last ditch plea to extricate Attorney O'Malley from his own malpractice. This Court (in a case cited by the Iowa Supreme Court) has addressed the issue in a factual setting very similar to the instant case:

> "..., a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant. Moreover, this Court's own practice is in keeping with this general principle. For example, if counsel files a petition for certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition."

Link v. Wabash Railroad Co., 370 U.S. 626, 634n10 (1962); (App. 42); (underlining supplied to show emphasis in original).

The dismissal as a sanction in this case is no different than a state court judge granting a motion for summary judgment or a motion to dismiss when the non-moving party fails to file a resistance. In the instant case, Krugman's lawyers failed to try the case on its merits on an agreed trial date because they were not prepared for

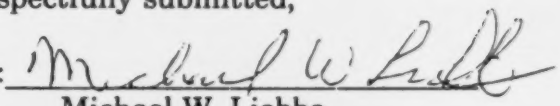
trial. (App. 32-33, 35, 38, 39-40, 168, 171, 172-173, 175).

The predicament in which Krugman's attorneys found themselves is one of their own making. (App. 39). The Iowa courts provided Krugman with all the legal process to which she was due.

CONCLUSION

For the above enumerated reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

By: 

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APPENDIX

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

BONNIE KRUGMAN,

Plaintiff,

v.

PALMER COLLEGE OF CHIROPRACTIC, WARREN RHODES, and PATRICK T. KEEFE,

Defendants.

Law No. 66572

ORDER

FILED

1986 APR 28 PM 2:14

MARLENE K. NELSON
CLERK OF DISTRICT COURT
SCOTT COUNTY, IOWA

This litigation was commenced by the filing of a Petition on September 1, 1982 concerning chiropractic care received by the Plaintiff on September 3, 1980. This case was placed on the strike list under Iowa Rule of Civil Procedure 215.1. Plaintiff filed a trial certificate on September 16, 1985 representing to the Court that she would be ready for trial by January 10, 1986. Their certificate was filed over three years after the Petition was filed, and over five year (sic) after the event which is the subject matter of this litigation. A trial setting conference was held on October 22, 1985 in which a settlement conference was set for April 10, 1986 at 2:00 o'clock p.m., and a trial was scheduled for April 28, 1986 at 9:00 o'clock a.m. by stipulation of counsel. A trial setting conference memorandum was signed by the Court reflecting that this case is continued, and shall not be stricken under Rule 215.1.

The trial date has arrived. The jury was present and waiting. The Court called the case for trial. Plaintiff is not prepared to try this case. The remaining Defendants Palmer

College of Chiropractic, Patrick T. Keefe, and Warren Rhodes (a resident of Mississippi) are personally present, represented by their counsel, and prepared for trial. Palmer College is present by its President J. F. McAndrews and its Vice President for Academic Affairs, R. Douglas Baker. Plaintiff Bonnie Krugman was not present. The law firm of Winstein, Kavensky, Wallace and Doughty by Allan Hartsock appeared as counsel for Plaintiff.

The Court had before it for ruling motions for sanctions requesting, inter alia, dismissal of Plaintiff's Petition. The Court, having painstakingly reviewed the file in its entirety, considered the arguments of counsel, and being fully advised finds the sanctions sought are appropriate. The sanctions to be applied do not involve merely the rights of Bonnie Krugman. The sanctions involve the rights of all parties to an expeditious and orderly disposition of the case. It implicates the public interest and concern about undue delay of litigation. Finally, it concerns respect for and compliance with Court orders. Sanctions ensure that a party will not be allowed to profit from the failure to comply with Court rulings. Sanctions must be exercised in this case not merely to penalize those whose conduct may be deemed to warrant sanctions imposed but to deter those who might be tempted to such conduct in the absence of such a deterrent. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 96 S Ct. 2778, 49 L Ed 2d 747, 751 (1976).

There have been a flurry of motions filed since Palmer College on March 21, 1986 filed a Motion to Compel Supplemental Answers to Interrogatories, and to exclude Certain Identified Expert Witnesses. These motions include Defendants' Motions for Sanctions to Exclude Expert

Witnesses, Plaintiff's Application to Continue Trial, and Plaintiff's Reconsideration of Application for Continuance of Trial Setting and for Extension of Time to Complete Discovery. Court hearings have been conducted, and Orders issued April 1, 1986, April 9, 1986 and April 21, 1986.

These pleadings and Court Orders clearly show that the present circumstances in which Plaintiff and her counsel find themselves stem back to 1982, the year in which this case was filed. By proof of service dated October 28, 1982 Palmer College mailed its first set of interrogatories to Plaintiff. Those interrogatories sought information relating to expert witnesses and damages. The interrogatory answers served on December 16, 1982 provided in part that no expert had been engaged as yet for the purpose of testifying at trial and that the Plaintiff's investigation continued.

The Court file reflects that the Plaintiffs failure to have expert testimony was brought to the Court's attention nearly three years ago:

> "In May of 1983, the battle over who are plaintiff's experts and when is plaintiff going to get an expert appeared to the attention of the Court, and at that time plaintiff had no experts. The Court ruled that the plaintiff did not have to answer the interrogatories further with respect to plaintiff's experts, and that plaintiff should not file a trial certificate until the plaintiff had secured an expert and an opinion from said expert and had completed sworn answers to certain interrogatories pertaining to that testimony. It appears to the Court that on July 2, 1984, the plaintiff for the first time, designated an expert, one Dr. Neil Allen. It then appears that there were problems

> concerning efforts on the part of the defendant to take the deposition of Dr. Allen, and the assistance of the Court was sought."
>
> COURT ORDER filed April 9, 1986, p. 1.

This court is faced with a trial certificate filed by Plaintiff on September 16, 1985 that represents that Plaintiff will be ready for trial by January 10, 1986. It is obvious the trial certificate was only filed to take this case off the strike list. Since the filing of the trial certificate seven months ago, there is no showing of any action by the Plaintiff to have this case prepared for trial.

The defendants have done just the exact opposite.

> "In view of the remarkable lack of activity on the part of the plaintiff, the defendants procured a pretrial conference to be held in this case in January of 1986, primarily for the purpose of setting dates by which discovery should be completed, for closing pleadings, and for listing of expert witnesses. The order resulting from that conference recites that counsel of record for all parties agreed on the dates set out in the order, and the order itself provided that the dates would not be extended except upon showing of good cause. The very first item on the list was the listing of all expert witnesses the plaintiff intended to call on or before February 28, 1986."
>
> COURT ORDER filed April 21, 1986, p.2.

Following the entry of this January 28, 1986 Order, the defendants have continued to diligently prepare for this trial.

The Court has ruled upon a Motion to Compel, a Motion for Sanctions, and a Motion for Summary Judgment filed by the Defendants. The Court has ruled upon a Motion to Continue and a Motion to Reconsider filed by Plaintiff.

The Court in ruling on these motions has made the following findings concerning the actions of Plaintiff's counsel:

> "All fault and neglect in this case has been by plaintiff."
>
> COURT ORDER filed April 9, 1986, p. 3.
>
> ". . . the plaintiff never intended to be ready for trial on the 28th of April, 1986."
>
> COURT ORDER filed April 9, 1986, p. 3.
>
> "The plaintiff has taken no move to take evidentiary deposition of her own experts, although her attorney advises that he does plan to present the testimony of some, if not all of them, by evidentiary deposition. It is clear that the attorney for the plaintiff has known since February that he was planning to use these doctors. The failure to file the answers to the interrogatories designating these persons as experts and supplying the other information required appears to have been a deliberate ploy to avoid the trial date which had been set October 22, 1985."
>
> COURT ORDER filed April 9, 1986, p. 3-4.
>
> ". . . competent trial counsel from Rock Island, Illinois, members of whom are qualified to practice law in the State of Iowa, have appeared in this case since its inception."

COURT ORDER filed April 9, 1986, p. 4.

"Plaintiff's counsel has not advised the Court that there are not other persons in his law firm who could try one or the other of these cases, . . ."

COURT ORDER filed April 9, 1986, p. 4.

". . . the interrogatory has never been supplemented under oath, and therefore stands as a failure to answer the interrogatory."

COURT ORDER filed April 21, 1986, p.2.

". . . no steps whatsoever were taken by the plaintiff to make those witnesses available for immediate depositions."

COURT ORDER filed April 21, 1986, p. 3.

"The Court also notes that plaintiff's attorney does not advise the Court candidly when he is in trouble. He waits till the very last minute, and then springs these surprises and asks for the Court to allow him once more to continue the case. He has never yet met a deadline to which plaintiff's counsel has agreed, and as previously written, it is clear that up until this time, he never intended to. The Court has no basis to believe that either the Court or the defendants will be treated in any better fashion in the future."

COURT ORDER filed April 21, 1986, p. 3-4.

> "No excuse is shown as to why the plaintiff has not made her experts available for discovery depositions. There are other attorneys who could have been present at the discovery depositions."
>
> COURT ORDER filed April 21, 1986, p.4.

This Court adopts the above findings as the findings of this Court. With this record having been established, this case was assigned for trial before the undersigned. The Defendants have filed two motions for sanctions on April 22 and April 25 requesting that the Court dismiss Plaintiff's Petition for failing to comply with discovery rules and Court orders. In ruling upon these sanction motions the Court finds that Plaintiff has with impunity violated Court Orders.

(A) Plaintiff has failed to comply with the January 28, 1986 Rule 136 Order.

(B) Plaintiff has violated the April 1, 1986 Order requiring and directing the filing of supplemental answers to interrogatories.

(C) Plaintiff has violated the April 1, 1986 Order by failing to make these experts available for depositions.

(D) Plaintiff's counsel forced the cancellation of the settlement conference to be held on April 10, 1986. This conference had been scheduled since October 22, 1985.

(E) Plaintiff has violated the April 9, 1986 Order by failing to file settlement conference documents under District Court Rule 7.1B. Plaintiff has not filed an exhibit list, pretrial brief, proposed jury instructions, or the negligence action check list including a detailed itemization of damages.

In contrast Defendants have fully complied with

settlement conference documents. Defendants have also filed motions in limine and under Iowa Rule of Evidence 104. Defendants have made themselves available to take the depositions of Plaintiff's experts, and have on record agreed to make their experts available.

Judge Briles findings that plaintiff never intended to be ready for trial, and plaintiff's counsel's actions have been a deliberate ploy to avoid trial have been confirmed, and unmistakably established once again on the morning set for trial. The totality of the record establishes willfulness, bad faith, fault and gross neglect all to the prejudice of Palmer College, Warren Rhodes and Patrick Keefe. Plaintiff and her counsel have flagrantly disregarded the rules of discovery, specific Court Orders, and the rules of practice and procedure of the Seventh Judicial District.

Attorney O'Malley has argued in the Continuance Motion and the Reconsideration Motion that his unavailability due to an Illinois Court trial should excuse his conduct. The Court rejects this claim. It is clear that even if Mr. O'Malley was present the case is not ready for trial.

The fact that a Motion for Continuance was filed on April 8, 1986 and denied on April 9, 1986 makes it obvious that the trial nineteen days away must be prepared for with all due diligence. Despite this clear signal the Plaintiff has made the situation intolerable by violating Court Orders and thereby hindering the Defendants in the preparation of their case.

The Plaintiff is not prepared to try this case. As part of the trial proceedings the Plaintiff was ordered to make her experts Dr. Kaplan, Dr. Quinlan, and Dr. Ward available for discovery depositions at this trial setting. That Order does not become the law of the case so as to preclude this Court from

changing it before final judgment. Kuiken v. Garrett, 51 NW2d 149, 154 (Iowa 1952); Cowman v. LaVine, 234 NW2d 114, 124 (Iowa 1975); In re Hutchinson's Estate, 121 NW2d 501, 506 (Iowa 1963). Those experts are not present, and there has been no showing that they will be present this week to testify in accordance with the trial setting. This violates not only the spirit but also the intent of the Court's April 21, 1986 Order. This is yet another example of the flagrant disregard of Court Orders, and another ploy to avoid this trial. The Defendants have once again urged that their motions for sanctions to exclude the expert testimony of these three doctors be granted. The Court agrees, and hereby orders that such expert testimony shall not be allowed.

The final and ultimate sanction to be imposed is the dismissal of the Petition with prejudice. The facts and circumstances set forth in this Order, and reflected in the Court file give this Court no other alternative. The Defendants by their motions, affidavits, and their appearance on the morning of trial have expressed the prejudice to which they have been subjected. The record reflects that there is only $100,000.00 in insurance coverage, and the Petition as originally filed sought $2,000,000.

Finally, the Defendants have offered as a part of this record the exhibits designated in their settlement conference compliance statement. Those Defendants' Exhibits A through J as indentified (sic) in Defendants' Exhibit List are admitted into evidence since no objections were filed by Plaintiff in accordance with the April 19, 1986 Order. Further no objections were made at the time of the Defendants' offer.

The Plaintiff has not submitted an exhibit list as required by the April 19, 1986 Order and under District Court

Rule 7.1B. Therefore, the Court can not rule on Plaintiff's Exhibits, if any, pursuant to the sanction motion.

The exhibits offered by Defendants include the evidentiary deposition of the treating neurosurgeon Neal F. Kassell. Dr. Kassell is of the opinion that within a reasonable degree of medical certainty the chiropractic adjustment administered by Defendant Warren Rhodes to the Plaintiff in the Palmer College clinic had no causal connection to the rupturing of the congenital arteriovenous malformation.

For the reasons set forth herein and contained in the Court file, sanctions under Iowa Rule of Civil Procedure 134 are granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Dr. Kaplan, Dr. Quinlan, and Dr. Ward are precluded from offering expert opinion testimony.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Bonnie Krugman's Petition is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cost of this action are taxed to the Plaintiff Bonnie Krugman.

Dated this 28th day of April, 1986.

/s/ Edward B. deSilva
Judge of the Seventh
Judicial District

IN THE IOWA DISTRICT COURT FOR
SCOTT COUNTY

BONNIE KRUGMAN,

Plaintiff,

vs.

PALMER COLLEGE OF CHIROPRACTIC, et al

Defendants

FILED

1986 MAY 27 AM 9:50

MARLENE K. NELSON
CLERK OF DISTRICT COURT
SCOTT COUNTY, IOWA

LAW NO. 66572

RULING ON MOTION TO VACATE DISMISSAL ORDER AND ORDER OF SANCTIONS OF APRIL 28, 1986

On May 23, 1986 the above Motion filed by the Plaintiff comes on for hearing, said Motion asking that this Court vacate its previous order of dismissal and sanctions entered on April 28, 1986 and to reschedule this matter for trial, together with entry of pretrial order setting forth reasonable cutoffs for the completion of all discovery, evidence depositions and filing of all pretrial submissions and scheduling a final pretrial.

This court is not sure as to what Code section the Motion is filed under. There is no specific statement as to what rule of Civil Procedure the Plaintiff is filing under, but upon examination of Plaintiff's counsel it was determined that Rule 244 and 252 were the rules under which this Motion was filed. If filed under Rule 252 and 253 the Court is not informed as to what the grounds were for the filing of said Motion, although the body of the Plaintiff's Motion certainly sets forth the basis.

If filed under 244 there also are some procedural requirements, in that Rule 244 again must specify the grounds for the request, and it must be done in accordance with the subsection of said Iowa rule. However, again, the Motion filed by the Plaintiff contains the language and statements which the Court feels are setting forth the Plaintiff's position, and the ruling will be made as if this matter was filed alleging a ground under either 252 or 244 of the Iowa Rules of Civil Procedure, and for all purposes is considered by this Court as if properly filed.

This Court having examined the statements and allegations made in the Motion and examined the affidavit filed in support thereof on May 23rd by the Plaintiff and having heard the arguments of counsel at this time denies the Plaintiff's Motion moving this Court vacate its previous order of dismissal and sanctions entered on April 28, 1986; and because of this ruling, it is not necessary for this Court to reschedule this matter for trial or any additional pretrial orders.

It is therefore ORDERED, ADJUDGED and DECREED that the Motion to Vacate Dismissal Order and Order of Sanctions of April 28, 1986 filed by the Plaintiff be and the same is hereby denied.

Dated this 25th day of May, 1986.

/s/ Edward B. deSilva
Judge of the Seventh Judicial
District of Iowa